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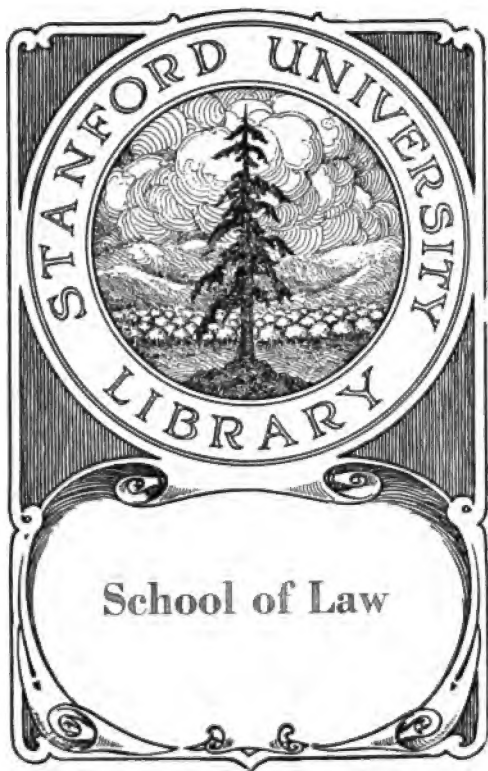
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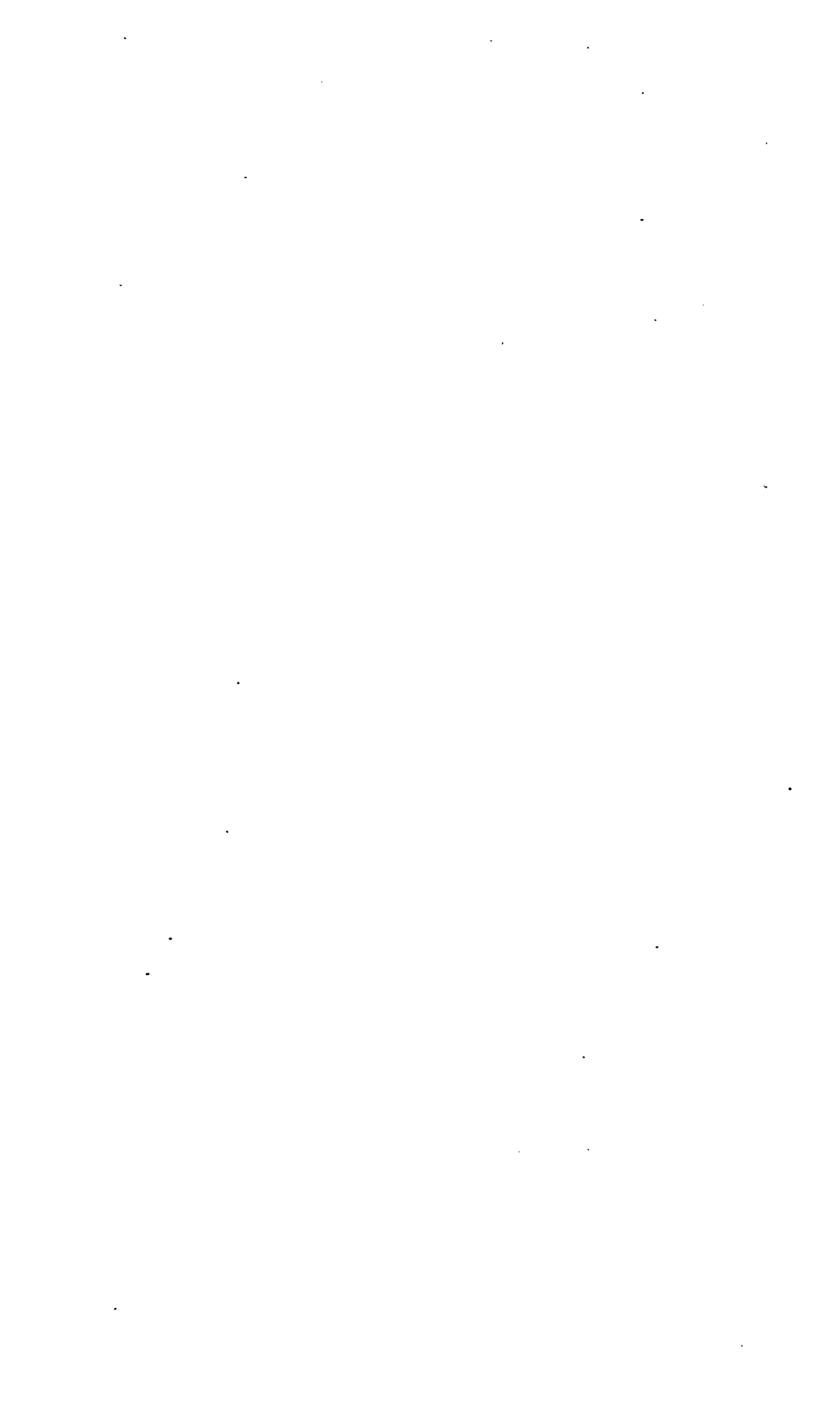
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IN

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AND UPON

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER.

IN

**TRINITY AND MICHAELMAS TERMS, 1843, AND HILARY AND
EASTER TERMS, 1844.**

BY

HENRY DAVISON, ESQ.

AND

HERMAN MERIVALE, ESQ.

OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

VOL. I.

WITH

AN INDEX OF THE PRINCIPAL MATTERS.

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1844.

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MEMORANDA.

Lord Abinger, Lord Chief Baron of the Court of Exchequer, died in Hilary Vacation, 1844. In the same vacation, Sir Frederick Pollock, Her Majesty's Attorney General, was appointed Lord Chief Baron, having been first made Serjeant at Law, when he gave rings with the motto "*Jussa capessere fas est*;" and Sir W. W. Follett, Her Majesty's Solicitor General was promoted to the office of Attorney General. In Easter Term, 1844, Frederick Thesiger, of the Inner Temple, Esquire, was appointed Solicitor General, and was afterwards knighted.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

IN

TRINITY TERM,

IN

THE SIXTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
Lord DENMAN C. J. WILLIAMS J.
PATTESON J. COLERIDGE J.

In the Bail Court,
WIGHTMAN J.

The QUEEN v. JOHN NOTT, Esq.

1843.

May 29th.

MISDEMEANOR. The following indictment was found By 5 & 6 W.
at the Devon sessions. 4, c. 62, s. 13,
it is enacted
that it shall be

unlawful for any justice of the peace or other person to administer, &c. or receive, &c. any oath, affidavit, or solemn affirmation, "touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being." A proviso follows, containing several exceptions.

Held, that a count, charging the defendant with administering an oath touching certain matters and things whereof he, the defendant, had not any jurisdiction or cognizance by any statutes in force at the time being, the same oath not being before any justice, &c. (going on to negative the exceptions in the proviso), was bad, for not shewing the subject matter touching which the oath was administered, so as to enable the Court to draw the legal inference that it was one of which the defendant had not cognizance.

But *semble*, per *Patteson, Williams, and Coleridge Js.*, that it would be unnecessary to set out the oath administered *verbatim*.

Under 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 9, where judgment in a trial on a King's Bench record has been pronounced at the assizes, the Court above may "amend" the judgment, by setting it aside, if the indictment be defective.

Where a verdict has been given for the crown in such trial, and the defendant desires to have judgment pronounced at the assizes, it is the proper course for his counsel to state at the same time that he intends to avail himself of the provision of sect. 9 by moving the Court above for a new trial on the ground of misdirection, or in arrest of judgment.

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Devon to wit. The jurors for our lady the Queen upon their oath present that *John Nott*, late of the parish of Swimbridge, in the county of Devon, Esquire, on the 27th of October, in the fourth year of the reign of our lady the Queen *Victoria*, &c., to wit, at the parish aforesaid, in the county aforesaid, the said *J. Nott* then, to wit, on the day and year aforesaid, being one of the justices of our said lady the Queen aforesaid, assigned to keep the peace in and for the said county, did unlawfully administer to and receive from a certain person, to wit, one *J. Huxtable*, a certain voluntary oath, touching certain matters and things, whereof he, the said *J. Nott*, neither then, to wit, on the day and year aforesaid, to wit, at the time of administering and taking the said oath, nor at any other time, had any jurisdiction or cognizance, by any statute in force at the time of the administering and receiving of the said oath, or otherwise; contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Second count, that the said *J. Nott*, on the day and year aforesaid, at, &c., the said *J. Nott* then, to wit, on the day and year aforesaid, being one of the justices of our said lady the Queen, assigned to keep the peace in and for the said county, did unlawfully administer to and receive from a certain person, to wit, one *J. Huxtable*, a certain oath or affidavit, touching certain matters and things, whereof the said *J. Nott* then, to wit, at the time and on the occasion last aforesaid, had not any jurisdiction or cognizance, by any statute in force at the time being, that is to say, at the time of the administering and taking of the said last mentioned oath or otherwise, contrary to the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity.

Third count, that the said *J. Nott*, on the day and year aforesaid, at, &c., did unlawfully administer to and receive from a certain person, to wit, one *J. Huxtable*, an oath touching certain matters and things, whereof the said

J. Nott, at the time and on the occasion last aforesaid, had not any jurisdiction or cognizance, by any statutes in force at the time being, to wit, at the time of administering and receiving the last mentioned oath, the same oath not being before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament or any committee thereof respectively, nor the subject of any judicial inquiries, nor in anywise pending before the said *J. Nott*, and the same oath not being required by the laws of any foreign country to give validity to any instrument or instruments in writing, designed to be used in such foreign country; contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Fourth count, that on the day and year aforesaid, the said *J. Nott* was one of the justices of our lady the Queen, assigned to keep the peace in and for the said county; and that he, the said *J. Nott*, being such justice of the peace aforesaid, did, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully administer to and receive from a certain person, to wit, one *J. Huxtable*, a certain oath or affidavit touching certain matters and things, whereof the said *J. Nott* then, to wit, at the time and on the occasion last aforesaid, had not any jurisdiction or cognizance by any statute then in force, to wit, the same oath being touching and concerning a certain voluntary complaint or charge which the said *J. Nott* was then, to wit, on the day and year aforesaid, about to make or lay before the Right Reverend Father in God, *Henry*, Lord Bishop of Exeter, against a certain person, to wit, the Rev. *John Russell*, clerk, perpetual curate of the united parishes of Swimbridge and Landkey, to wit, in the county aforesaid, and within the diocese of the said bishop; contrary to the form of the statute in such case made and

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provided, and against the peace of our lady the Queen, her crown and dignity.

There were two other sets of counts, charging in the same words the administering an oath to two other persons respectively.

The indictment was removed by certiorari into this Court, and tried by a special jury before *Coleridge J.*, at the Devon spring assizes, 1842. The defendant was a justice of the peace for the county of Devon. The facts proved were, that he had administered an oath to *John Huxtable* concerning the truth of certain statements, made by him, *Huxtable*, respecting acts of gaming attributed to *Mr. Russell*. These statements, so attested, the defendant had reduced to writing, and forwarded to the Bishop of Exeter. He had also administered a similar oath to the two other individuals as to certain reports that *Mr. Russell* had neglected his clerical duty: (viz. in neglecting to pray with a sick parishioner, and delaying the burial of a child).

The following are the material provisions of the act 5 & 6 Will. 4, c. 62, on which the indictment was framed. The preamble recites the 5 Will. 4, c. 8, intituled, "An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the state, and to substitute declarations in lieu thereof: and for the more entire suppression of voluntary and extrajudicial oaths and affidavits," and proceeds, "whereas it is expedient to amend the said act, and to make some further provisions for the better effecting the object thereof, and to consolidate all the provisions relating thereto into one act." The next following sections abolish oaths in certain cases, and substitute declarations. Sect. 6 contains a proviso that nothing contained in the act shall apply to the oath of allegiance. Sect. 7 is as follows: "Provided also and be it enacted, that nothing in this act contained shall extend or apply to any oath, solemn affirmation, or affidavit, which now is or hereafter may be made or taken, or be required to be made or taken, in

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any judicial proceedings in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but that all such oaths, affirmations and affidavits shall continue to be required and to be administered, taken and made, as well and in the same manner as if this act had not been passed." The five next sections substitute declarations for oaths in certain other cases. Sect. 13 is as follows: "And whereas a practice has prevailed of receiving oaths and affidavits, voluntarily taken and made in matters not the subject of judicial inquiry, nor in any wise pending or at issue before the justice of the peace or other person, by whom such oaths or affidavits have been administered or received; and whereas doubts have arisen, whether or not such proceeding is illegal: for the more effectual suppression of such practice, and removing such doubts, be it enacted, that from and after the commencement of this act, it shall not be lawful for any justice of the peace, or other person, to administer, or cause to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation, which may be required by the laws of any foreign country to give validity to instruments in writing, designed to be used in such foreign countries respectively."

It was contended at the trial, especially with respect to the first set of counts, that inasmuch as it appeared from the evidence that they related to oaths imputing misconduct of a description cognisable by magistrates to Mr. *Russell*,

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such oaths were within the exception, "in any matter or thing touching the prosecution, trial or punishment of offences;" and that, with regard to all the counts, the defendant was entitled to an acquittal, inasmuch as he had not acted wilfully, nor was averred to have done so in the indictment, but in ignorance of the law, and in furtherance of what he considered a public duty.

The learned judge directed the jury that the offence was within the words and object of the statute, the mischief contemplated by which was of a public nature, and therefore contravention of it indictable; nor could ignorance of the law be an excuse in such a case; and that, in his opinion, the oaths proved to have been administered were within the enacting part, and not within the proviso. Verdict, on the eight last counts, guilty of *inadvertently* administering the oaths; which was entered as a verdict of guilty generally: on the four first counts, not guilty.

The learned judge having a discretionary power, under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, to pronounce judgment or not, the defendant consented to judgment being pronounced forthwith, and was sentenced to a month's imprisonment, which judgment was respited by the learned judge to the sixth day of the ensuing term, under the provisions of the above statute.

In the following term,

Erle moved for a rule nisi for a new trial, or why the judgment should not be "amended."

As to the first point, he relied on the preamble of the statute, as shewing that its object was merely to expound the law on a matter which had been considered doubtful, the illegality of what are commonly called voluntary oaths or affidavits. It does so by declaring them illegal, but imposes no punishment. If it had been a penal statute in language and object, defining an offence and annexing a penalty, unquestionably ignorance of the law would be no excuse for its violation. But the question is different,

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where no new offence is created, and no new punishment is annexed to an offence, but it is simply declared that certain acts are illegal. Here it may fairly be contended that wilful violation of the law is essential to render the offence punishable. The statute is intended as a warning: those, who having received the warning knowingly transgress, are proper objects of punishment. If the contrary doctrine were to prevail, many acts which are habitually done under the general notion of their legality, but which might be brought within the enacting part of this statute, are punishable criminally. [Lord *Denman* C. J. referred to the case of the Dorchester labourers: *Rex v. Loveless* (a).] In that case there was a public mischief. Where this is not the case, intent is necessary to a criminal breach of a statute. For instance, there are many railway statutes rendering acts which would otherwise be quite innocent, such as walking on the line, &c. penal, and prescribing particular modes of recovering the penalty. If there were a public mischief contemplated by those statutes, an indictment would lie for the commission of such acts by persons ignorant of the law; which clearly could not be the case (b). [Lord *Denman* C. J. How can it be argued that a public mischief is not contemplated in the act now under consideration? Oaths might be administered which might be false, yet not perhaps liable to an indictment for perjury. A kind of mock tribunal is erected, before which the characters of absent parties are sworn away without relief and without jurisdiction; is that not a public mischief?] The mischief there is in the falsehood of the charge: the idle solemnity of a voluntary oath would not add effect to it. At all events, the oaths administered to the witnesses named in the two last sets of counts are within the proviso. The conduct imputed to Mr. *Russell* was punishable certainly by ecclesiastical law.

2. The motion to "amend" the judgment rests on the words of 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 9, that upon trials

(a) 1 M. & Rob. 349.

(b) 2 Hawk. P. C. c. 25, s. 4.

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for felony or misdemeanor, on a King's Bench record, judgment may be pronounced at the assizes, "and shall have the effect of a judgment of the Court above, unless that Court in the first six days of term grant a rule nisi for a new trial, or for *amending* the judgment." The word "amend" is certainly one of ambiguous meaning here; it should seem that the Court cannot amend a judgment, generally speaking, by diminishing the punishment: *Rex v. Lloyd* (a); but it was obviously the intention of the legislature to give some benefit of legal objections to the record to a defendant who submits to judgment at the assizes; and if necessary for the furtherance of justice, the Court will "amend" (b) by virtually arresting it. If so, the following defects may be specified in the indictment. The second and fourth counts are too general: "oath or affidavit." The first two and the fourth do not negative the proviso in section 13 at all. The third negatives it, but does not negative that in section 7, or shew that the offence is one contemplated by the preamble. All of them are defective in not setting out with particularity the oath administered: *Rex v. Nield* (c). None of them aver that the offence was "wilfully" committed. The last eight counts are only the first four repeated twice over, with reference to other oaths.

LORD DENMAN C. J.—I should certainly be reluctant to hold that a defendant, who has submitted to judgment at the assizes, has no mode of availing himself of defects on the record afterwards, when it seems to have been the intention of the legislature to give him the power in some way; and therefore it will be necessary to consider whether under the word "amend" the Court has not power over the judgment. But it ought to be understood in future,

(a) 4 B. & Ad. 135.

(b) On the argument in shewing cause against the rule it was suggested that the word "amending" might possibly be a misprint for

"arresting;" but on reference to the roll it appeared to be the same in the original.

(c) 6 East, 417.

that where a defendant, by his counsel, himself assents to the exercise of discretion by the judge at nisi prius in pronouncing judgment, notice should be given at the same time of his intention to apply for such amendment, or for a new trial on the ground of misdirection.

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The COURT took time to consider, and afterwards, in the same term, granted a rule nisi on both points.

Sir *F. Pollock* A. G., *Cockburn* and *Hayward* now shewed cause. The circumstances of the case brought the defendant clearly within the act, and rendered him punishable. The oaths administered were not within any of the exceptions, whether contained in section 7 or in section 13; and this being the case, it cannot be contended that the preamble of the act is to be resorted to, to put a meaning on its enacting part altogether inconsistent with its plain language. There could be no more distinct case of public mischief, than the practice of persons invested with judicial and administrative authority availing themselves of their position to administer oaths to persons who might have idle stories to tell affecting the characters of others, and thus giving currency and a stamp of authority to charges insignificant and possibly libellous. And, at all events, where there is a public mischief, the contravention of it is a misdemeanor, and indictable without express words in the statute; *Hawkins*, P. C. book 2, c. 25, s. 4; 4 *Bl. Com.* 6; particularly where the statute does not make a new offence, but declares the law. The directions of the learned judge are, therefore, strictly legal, and warranted by the circumstances of the case. The other branch of the motion is in arrest of judgment, which there are no words in 11 *Geo.* 4 & 1 *Will.* 4, c. 70, s. 9, to authorise. As to the defects relied upon, where the contravention of a statute is indictable, it is not necessary to aver that such contravention is wilful; *R. v. Sainsbury* (a). The proviso in sect. 13 is suffi-

(a) 4 T. R. 451,

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ciently negatived in the third count; and it could not be necessary, in addition, to negative another proviso inserted, in a different part of the act; especially where, as it will be clearly seen on comparing the two, that in section 7 is substantially repealed in section 13. As to the objection, that the oath is not set out with sufficient particularity, it is quite sufficient to say that the facts in issue are only, whether an oath was administered, and whether the subject-matter, respecting which the oath was sworn, was within certain exceptions in the statute; it is not, therefore, like the case where the issue is, whether the things sworn to were false or true, material or immaterial; and, if the objection means any thing, it must be contended that every word of the statement sworn to by the witness is to be set out in the indictment.

Sir *W. W. Follett* A.G., *Erle* and *M. Smith* contra. Some degree of particularity in the statement of the matter sworn to was absolutely necessary. In *Rex v. Moors* (cited in *Rex v. Neild*(a)) this was held unnecessary, on the express ground that it was rendered so by the stat. 37 Geo. 3, c. 128; and the absence of a similar clause in the act now under consideration raises the inference that it is necessary. [Lord *Denman* C. J. Independently of express statutory enactments, I should have thought it could not be necessary to set out the particulars of an oath administered. But here nothing is averred concerning the nature of the matter as to which the oath was sworn, which is quite a different objection.] The jury were left to draw an inference, which is strictly one of law. They cannot decide whether or not the matter, in respect of which an oath was sworn, be within the enacting part or the excepting of the act. Thus much, therefore, should be averred, even if more need not be set out. But in *R. v. Sparling*(b) it was decided, that "in a conviction for cursing and swearing, the oaths and curses

(a) 6 East, 417, n.

(b) 1 Stra. 497.

must be set out." The only count which contains any averment respecting the matter deposed to, is the fourth; "touching certain matters and things whereof the said *J. Nott* then had not any jurisdiction," &c., to wit, "touching a certain voluntary complaint or charge," which the said *J. Nott* was going to make before the bishop. But that count is bad, as is in fact admitted, having the words, "oath or affidavit" in the alternative. Next, the provisoes are not negatived; *Spieres v. Parker*(a); *Rex v. Pratter*(b). The particulars of a threatening letter must be set out; *Rex v. Lloyd*(c). The third count is the only one which negatives the proviso in the 13th section; and this is open to other objections; it does not clearly shew that the defendant was a justice of the peace at the time of administering the oath; and the words "other person" in the act must be interpreted as applying to persons *ejusdem generis*, persons in some authority. There should also be an averment that the act was done wilfully or contemptuously; this case differs widely in its circumstances from *Reg. v. Price*(d), where those words might be unnecessary.

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Lord DENMAN C. J.—On consideration it appears to me that the power of this Court over judgments pronounced at the assizes on trials of a King's Bench record, is effectually preserved by the 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 9. There may be a new trial, or the judgment may be amended: if we think the indictment bad, this can be done in no other way than by pronouncing substantially that no judgment shall be had upon it. In this way the Court must act, in order to exercise the jurisdiction so carefully preserved to it. It appears now to be admitted, in the course of argument, that all the counts of this indictment are bad except the 3rd, and the 7th and 11th, which are repetitions of it. The count is framed on the 5 & 6 *Will. 4*, c. 62, s. 13. That statute renders the administering or receiving

(a) 1 T. R. 141.

(c) 2 East, P. C. 1122.

(b) 6 T. R. 559.

(d) 11 Ad. & E. 727; S. C. 3 P. & D. 421.

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certain oaths illegal. It does not appear necessary now to inquire whether it goes further, and renders such acts criminally punishable: because the count does not in my opinion sufficiently bring the alleged offence within the act. The offence is defined to be the administering of any oath "touching any matter or thing whereof such justice, &c. hath not cognisance by some statute in force at the time being:" and then follow certain exceptions. It must then be essential that it should appear by the indictment that the matter, concerning which the oath was administered, was one of which the defendant had not cognisance by any statute at the time of the act. Whether any given matter be so or not, is a conclusion of law. Facts therefore should be averred from which the judge may draw that necessary conclusion, otherwise it is left to the jury to draw an inference of law. The want of any such averment appears to be a sufficient objection; and it is unnecessary to advert to the objections which have been raised irrespectively of the indictment.

PATTESON J.—I have felt some difficulty as to the extent of our power under the words "amend the judgment." But the meaning of the legislature seems clear. The same section provides that we may grant a new trial. That could not be done, without setting aside the former judgment. If we could set aside the judgment in that case, there seems no absurdity in our doing so under the word "amend," otherwise we have no control over the judgment; for in *Rex v. Lloyd* this Court disclaimed the power of interfering with a sentence, unless on special facts brought to its notice. I think therefore we must set aside the judgment for the crown, and direct that none be entered. The objection to the count is, that it does not shew on the face what was the matter as to which the deposition was taken. It could not be a question for the jury, whether it was a matter whereof the defendant had cognisance or no. It is indeed averred that it was a matter whereof he

had not such cognisance ; but are we to take the pleader's word for that? We ought to have the subject-matter of the oath set out, that we may judge for ourselves. I do not say that the words of the oath, or whole statement sworn to, are necessary.

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WILLIAMS J.—I wish to be understood as limiting my judgment distinctly to the same ground which has been taken by my brothers who have preceded me, not as agreeing with the arguments advanced at the bar, as to the necessity of setting out the oath to its full extent. No doubt the cases referred to, of indictments for false pretences, perjury, and profane swearing, have some sort of application, but they are not identical, because here the offence is that of administering an oath in a matter wherein an oath cannot be legally administered, not of administering an oath to a party making certain statements. The statements themselves do not form any necessary part of the charge, and the insertion of them would oppose insurmountable difficulties on the whole. All I say is, therefore, that there should have been some distinct allegations as to the matter or thing, touching which the oath was administered, sufficient to shew that it was not one of which the defendant had cognisance. As to the power of the Court to amend the judgment, I agree in the view already taken.

COLERIDGE J.—I am of the same opinion on both points. There ought to be some statement of the subject-matters of the oath ; not the oath itself in terms. Even to this limited extent, I feel that the necessity imposes some difficulty, and may in some cases tend to impede justice ; but that is a less evil than breaking through a rule which I have always considered inflexible, certainly in criminal pleading, which is, that, where a statute describes prohibited acts simply by their legal character, it is not sufficient merely to aver that legal character, because, if so, a jury would have to decide whether they possessed it or no :

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enough, therefore, must be set out to shew the Court that they possess it.

Rule absolute to "amend" the judgment.

Monday,
May 29th.

Semble, that where a creditor, who has obtained execution on a judgment on a warrant of attorney, brings an action against the assignees of a bankrupt to try the validity of an execution, it lies on him (the plaintiff) to shew that the warrant was given in an action commenced adversely, if he relies on 1 Will. 4, c. 7, s. 7.

LINNIT v. CHAFFERS and others, Assignees of T. HAMLET.

THIS was a feigned issue, under the direction of *Alderson B.*, between a creditor, who had obtained judgment on a warrant of attorney against *W. Hamlet*, and the assignees of bankrupt of *Mr. Hamlet*. The issue was drawn up with a recital that the sheriff had taken goods of the bankrupt in execution under a writ of test. fi. fa., on a judgment obtained by the plaintiff, and that a fiat had issued against the bankrupt, and that thereupon a discourse was had, &c. "whether the aforesaid execution was valid against the said fiat."

The case was tried before Lord *Denman C. J.*, at the sittings after Michaelmas Term, 1843.

It appeared that the warrant of attorney was dated 5th November, 1840. The levy in execution under the judgment was on 22d January, 1841, and the act of bankruptcy, which supported the fiat, on the 4th March, 1841. The date of the fiat was March 20, 1841, and the sale of the goods took place afterwards. At the trial, the plaintiff proposed to contest the bankruptcy; this was objected to on the part of the defendant, as not within the meaning of the issue, and his lordship was of that opinion. The defendants relied on the following admission, which had been entered into between the parties previously to the trial:—"That the test. fi. fa. in the pleadings in this cause mentioned is founded on and issued out by virtue of a judgment signed on a certain warrant of attorney, bearing date 3d December, 1840, purporting to be given by the said *Thomas Hamlet* to the above-named plaintiff, as a collateral security for the sum of 5000*l.* as therein mentioned; and

that such test. fi. fa. was duly executed on the effects of the said *T. H.* by the sheriff of the county of Bucks, at Barham, in the said county, on the 22d January, 1841." They also relied on the execution not being completed, having been executed by seizure only. On this point, *Whitmore v. Robertson* (a) was cited for them; but as that case was then pending before the Exchequer Chamber in error from the Exchequer, his lordship reserved the point, at the same time directing a verdict for the defendants.

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In the following term *Erle* Q. C. moved accordingly for a rule nisi to set aside the verdict, and enter it for the plaintiff, relying on the ground taken by the plaintiff in *Whitmore v. Robertson* (a). He contended further, that even if that authority were upheld, the plaintiff was entitled to succeed, inasmuch as the admission, which was all the evidence for the defendants, did not shew necessarily that the warrant of attorney was not given "in any action commenced adversely," in the words of 1 *Will.* 4, c. 7, s. 7; it must therefore be taken as against the defendants, that it was given in an action commenced adversely, and therefore protected by that statute, and exempted from the effect of 6 *Geo.* 4, c. 16, s. 108, on which the defendants relied. He also contended that on the form of the issue the defendants should have proved the bankruptcy. The rule was refused on the last point, and granted on the two others. (In the interval before shewing cause against the rule, the decision in *Whitmore v. Robertson* (a) was confirmed in the Exchequer Chamber in *Skey v. Carter* (b). The first point was therefore abandoned on the part of the plaintiff.)

Thesiger now shewed cause, and contended that the terms of the admission, fairly construed, were sufficient to shew that the warrant of attorney was not given in any action commenced adversely; but that, if not, it lay on the plaintiff to bring himself within the exception, not on the defendants to negative it, and cited *Rawdon v. Wentworth* (c).

(a) 8 M. & W. 463. (b) 11 M. & W. 571. (c) 10 M. & W. 36.

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Erle contrà, cited *Crosfield v. Stanley* (a).

LORD DENMAN C. J.—It is the plaintiff who seeks to try the validity of his *fieri facias*; it seems to me, therefore, that he ought so to point the issue as to shew its validity; if the warrant of attorney was given in an adverse action, it is for him to say so. But at all events the admission as framed in my opinion shews, when read with fairness, that the warrant of attorney was not given in any action commenced adversely.

PATTESON and WILLIAMS Js. concurred.

COLERIDGE J.—I am of the same opinion; but were it otherwise, it is clear that if 1 *Will.* 4, c. 7, s. 7, had not passed, the defendants would have been entitled; then it should seem that it lay on the plaintiff to bring himself within that enactment.

Rule discharged.

(a) 4 B. & Ad. 87.

Tuesday,
May 30th.

NASH and another v. ALLEN, Esq.

On the execution of a writ of *elegit* the sheriff's poundage under statutes 3 *Geo.* 1, c. 15, s. 16, and 8 *Geo.* 1, c. 25, s. 5, is to be calculated on the yearly value of the lands extended, and not on the sum to be levied under the writ.

CASE against the defendant as sheriff of Bucks, for an alleged extortion in the execution of a writ of *elegit*.
Plea: not guilty by statute.

It appeared from a case stated, by the consent of the respective parties, under an order of *Williams J.*, that the plaintiffs had recovered a judgment for 1000*l.* debt and 70*s.* costs, against one *John Carter*, and for obtaining satisfaction thereof, had issued on the 18th of August, 1841, a writ of *elegit*, directed to the sheriff of Bucks, in the usual form, against the lands of the said *John Carter*, indorsed by plaintiffs to levy 100*3l.* 10*s.* and interest from the 15th February, 1841, besides 50*s.* for that writ and besides, &c., and under which writ the defendant, the

sheriff of Bucks, held an inquisition, and extended, on that elegit, lands of the said *John Carter*, of the yearly value of 49*l.*, and delivered to the plaintiffs the lands under the said writ; that the sheriff claimed and received poundage for executing the said writ, the sum of 27*l.* 11*s.* 9*d.*, being the poundage on the sum indorsed on that writ; and the opinion of the Court was required, whether the sheriff is entitled to poundage on executing a writ of elegit, and if so, whether the poundage is payable on the whole debt, or only on the annual value of the land extended under the elegit.

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Atkinson for the plaintiff. The sheriff is only entitled to poundage on the annual value of the land extended, and not on the whole amount indorsed on the writ. The question depends upon the construction of statute 3 *Geo.* 1, c. 15, s. 16, which provides for ascertaining the fees for executing writs of elegit, so far as the same relate to the extending of real estates, and for ascertaining the fees for executing of writs of habere facias possessionem aut seisinam. The enacting part of the section, it is true, names only writs of habere facias possessionem aut seisinam, but it extends also to writs of elegit. The words are, "that it shall not be lawful for any sheriff, &c. by reason or colour of their office or offices, or by reason or colour of their executing of any writ or writs of habere facias possessionem aut seisinam," to take more "than the sum of 12*d.* for every 20*s.* of the yearly value of any manor, &c. whereof possession or seisin shall be by them or any of them given." If this is confined only to writs of habere facias possessionem aut seisinam, then no effect will be given to the words "by reason or colour of their office or offices." But the safest course in the construction of statutes is to give effect to the particular words of the enacting clause, and when the legislature in the same sentence uses different words, it is to be presumed that they are used in order to express different ideas: see the judgment of Lord *Tenterden* C. J. in *Rex*

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1. *Lord Justice* 11. From the words "by reason or colour of their office or offices" now a particular reference to writs of *elegit* for there is difficulty in saying which a writ of *elegit* is a *process*. The words in the latter part of the clause "whereof possession shall be by them or any of them given" are capable of being applied to writs of *elegit* as well as writs of *habere facias possessionem* &c. But the exposition we put a construction upon this statute in the subsequent act of the 4 Geo. 4 c. 25. s. 5, which enacts that "no sheriff of any county shall take for the extent and inventory and return *facias possessionem* and *sequestrum*, on the real estate, any more fees than are appointed by statute 2 Geo. 4 c. 25. s. 5 for executing a writ of *elegit* and *habere facias possessionem* and *sequestrum*, under the like penalties and forfeitures." This is a legislative exposition of the former statute, and shows that the fees to be taken by the sheriff in executing land under a writ of *elegit*, are regulated by it and limited to: poundage on the annual value of the land executed. This mode of construction has been adopted by the Courts. Statute 11 Geo. 4 & 1 Will. 4, c. 60, s. 5, in terms applies to trustees only, and it was held by the Master of the Rolls, that a mortgagee was not within the act, so as to authorise him in appointing a person to reconvey an estate to the party entitled to the equity of redemption on the death of the mortgagor intestate, as to his real estate, and without any known heir: *In re Goddard* (c), *Re Stanley* (d). But, after the passing of stat. 4 & 5 Will. 4, c. 23, the Court held that the 2d section of that statute—which empowers the Court of Chancery, "where any person seised of any land upon any trust, or by way of mortgage, dies without an heir, to appoint a person to convey such land in like manner as is provided by statute 11 Geo. 4 & 1 Will. 4, c. 60, in case such trustee or mortgagee had left an heir and it was not known who was such heir"—brought mortgagees and the heirs of mortgagees

(a) 8 B. & C. 74; S. C. 2 M. & R. 225.

(b) 2 Inst. 396.

(c) 1 Myl. & K. 25.

(d) 5 Sim. 320.

within the 8th section of the act of 11 *Geo.* 4 & 1 *Will.* 4, c. 60, although trustees only are named in it; the legislature having assumed that that statute, though in terms confined to trustees, extended in operation to mortgagees also.

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W. H. Watson for the defendant. The sheriff is entitled to poundage on the whole sum indorsed on the writ. The question was decided by the arbitrator in *Price v. Hollice* (a) in favour of the sheriff, but the Court gave no opinion upon the correctness of his judgment. But it is clear that before the passing of stat. 3 *Geo.* 1, c. 15, the sheriff was so entitled. The fees of the sheriff prior to that act were regulated by stat. 29 *Eliz.* c. 4, which enacts "that it shall not be lawful for any sheriff, &c. to have, receive or take, for the serving and executing of any extent or execution upon the body, lands, goods or chattels of any person, more than 12*d.* for every 20*s.* where the sum does not exceed 100*l.*, and 6*d.* for every 20*s.* being over and above the said sum of 100*l.*; that he or they shall so levy or *extend* and deliver in execution, or take the body in execution for, by virtue and force of any such extent or execution." This extends to writs of *elegit*: *Jayson v. Rash* (b). In *Peacock v. Harris* (c), *Powell J.* is made to express a doubt with regard to the opinion of *Holt C. J.* in the former case, but in the subsequent case of *Tyson v. Paske* (d) he agrees with *Holt C. J.*, and says that extent generally is the word of the statute of *Elizabeth*, and that an extent upon an *elegit* was an extent within the statute, as well as an extent upon a statute. These cases are referred to in *Com. Dig.* Viscount, (F). But there are no words in the enacting clause of the statute 3 *Geo.* 1, c. 15, which can apply to the writ of *elegit*; the words in the latter part of the clause, "whereof possession or seisin shall be by them or any of them given," clearly apply to writs of *habere facias possessionem* and *habere facias seisinam* only, and not to writs of *elegit*. The writ of *elegit*

(a) 1 *Mau. & S.* 105.

(b) 1 *Salk.* 209.

(c) 1 *Salk.* 332.

(d) 1 *Salk.* 333.

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requires the sheriff to cause to be delivered to the tenant, by a reasonable price and extent, all the goods and chattels of the defendant, except his oxen and beasts of the plough, and also a moiety of all his lands. And it is executed by the sheriff taking an inquisition and setting the lands out by metes and bounds, but the sheriff cannot give possession of the lands unless they are in the occupation of the defendant himself: *Rogers v. Pitcher* (a). If the statute then had contemplated the writ of elegit, it would have said, any such lands as the sheriff shall extend, and the words of the statute of *Elizabeth* are, "levy, extend and deliver in execution." But the writ of habere facias possessionem applies only to ejectment, and the writ of habere facias seisinam only to real actions, and therefore the writ of elegit is not within 3 *Geo.* 1, c. 15. The plaintiff also by an elegit gets his debt paid by extent and delivery of a moiety of the defendant's land, and he can never have any other execution; therefore when the sheriff has delivered the moiety of the land to the plaintiff, he has extended the whole debt, and is entitled to poundage upon the sum indorsed on the writ. To adopt the construction contended for by the other side would be to extend the enacting clause by the preamble, which is contrary to the rules of exposition. The preamble may be compared with the different clauses to collect the intention of the legislature, and when the intention is apparent, and an inconvenience would arise from giving full effect to the words employed in the enacting clause, it may be used in restraint of their generality, or it may be resorted to in explanation of the enacting clause if it be doubtful: *Crespigny v. Wittenoom* (b). But the enacting clause can never be extended by the preamble: *Wilson v. Knubley* (c). The cases cited upon Sir *E. Sugden's* Act do not apply, for the word trustees may well be held to embrace mortgagees; but, if the construction contended for on the other side be correct, it will follow

(a) 6 Taunt. 202.

on Statutes, pp. 656, 762.

(b) 4 T. R. 793; and Dwaris

(c) 7 East, 128.

that, if there should be a writ of elegit indorsed to levy 20*l.*, and the sheriff were to extend an estate of 5000*l.* a year, he would be entitled to poundage on the 5000*l.*, which is absurd. But the debt is the true criterion of the amount of the sheriff's poundage; if he takes the body, he is entitled to his poundage on the whole debt, and so also if he extends the land.

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Atkinson in reply. The absurdity would be the same if the debt were 5000*l.*, and the annual value of the land 20*l.*, if the sheriff is entitled to his poundage on the debt. The elegit is given by the Statute of Westminster, 2, 13 *Ed.* 1, c. 18, which gives the creditor, at his option, “quod vicecomes fieri faciat de terris et catallis debitoris, vel quod vicecomes liberet ei omnia catalla debitoris, exceptis bobus et affris carucæ, et medietatem terræ suæ, quousque debitum fuerit levatum per rationabile pretium et extentum.” And, if it appear to the sheriff there are goods and chattels sufficient of the debtor to satisfy the debt, he ought not to extend the lands (a). Under the 29th of *Eliz.* c. 4, the sheriff was only entitled to poundage upon an elegit where he extended the goods; but where the execution was against the real estate only, and no goods were taken, he was entitled to no poundage: *Lacy v. Barry* (b).

LORD DENMAN C. J.—The statute 8 *Geo.* 1, c. 25, s. 5, assumes that the statute 3 *Geo.* 1, c. 15, s. 16, had fixed limits to the sheriff's fees on the execution of writs of elegit. The latter statute provides, that for ascertaining the fees for executing of writs of elegit, so far as the same relate to the extending of real estates, and for ascertaining the fees for executing writs of habere facias possessionem aut seisinam, it shall not be lawful for any sheriff, &c. or any of them, by reason or colour of their office or offices, or by reason or colour of their executing any writ or writs of habere facias possessionem aut seisinam, to demand,

(a) 2 *Inst.* 395.

(b) 2 *Siderfin*, 155.

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ask, receive or take any other or greater fees than are there enumerated. Passing over the words "*by reason or colour of their office or offices*," there do not appear to be any words which directly apply to writs of *elegit*. But we are bound to give some meaning to these words, and they are capable of being applied to writs of *elegit*; we shall therefore break in upon no rule of construction by saying that these words, "*by colour of their office or offices*," in the enacting clause, were intended by the legislature expressly to apply to the extending of real estates by a writ of *elegit*. I think, therefore, the plaintiff in this action is entitled to recover.

PATTESON J.—I am of the same opinion. The words "*by reason or colour of their office or offices*," in the enacting part of this section, apply to writs of *elegit*, which are mentioned in the preamble. To construe the statute in this manner is not to extend the enacting clause by the preamble, but to give effect to the whole of the words of the enacting clause. "*By reason or colour of their executing writs of habere facias possessionem aut seisinam*," apply to the latter part of the preamble, and "*by reason or colour of their office or offices*" to the execution of writs of *elegit*, so far as the same relate to the extending of real estates. Unless we adopt that construction which the legislature has already put on the act by the subsequent statute of the 8 *Geo.* 1, c. 25, s. 5, we give no force to these words, "*by reason or colour of their office or offices*," for the latter words of the enacting clause completely provide for the case of writs of *habere facias possessionem aut seisinam*.

WILLIAMS J.—I agree with my lord and my brother *Patteson*. The words in the concluding part of the 16th section, "*whereof possession or seisin shall be by them or any of them given*," may refer to writs of *elegit*, as well as to writs of *habere facias possessionem aut seisinam*; then we are bound to give effect to the words "*by reason or*

colour of their office or offices," and this can only be done by holding that they were intended by the legislature to apply to the execution of writs of *elegit*, which are mentioned in the preamble of the section, and are clearly a description of execution to which the statute was intended to apply. Then in the statute of 8 *Geo.* 1, c. 25, s. 5, the legislature has put a construction upon these words by enacting that no sheriff shall take for the extent and liberate and *habere facias possessionem aut seisinam* on the real estate, and levy on the personal estate by virtue of such extent, any more than the *same* fees as are appointed by the statute 3 *Geo.* 1, for executing a writ of *elegit* and *habere facias possessionem aut seisinam*.

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COLERIDGE J.—It is clear that the legislature by the statute 3 *Geo.* 1, intended to ascertain the fees of the sheriff on the execution of writs of *elegit*, so far as the same relate to the extending of real estate. It is so expressed with accuracy in the preamble. The fees on the execution of writs of *elegit*, so far as they relate to extending the goods and chattels of the debtor, had been already provided for by stat. 29 *Eliz.* c. 4. The statute 8 *Geo.* 1, c. 25, s. 5, assumes that the enacting part of stat. 3 *Geo.* 1 had carried into effect that which the preamble of the statute stated to be an object of its enactments. We are bound to put the same construction upon the stat. 3 *Geo.* 1, if there are any words in the enacting part capable of being applied to the subject-matter. (His lordship then read the section.) There are the words, "by reason or colour of their office or offices," which are capable of being applied to writs of *elegit*, and are useless for any other purpose, and then the words in the latter part of the clause, "whereof possession or seisin shall be by them or either of them given," refer back to the particular writ, and also to the writs of *elegit*.

Judgment for the plaintiff.

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Thursday,
June 1st.

Where a writ of ca. sa. is delivered to the sheriff, with direction to be returned non est inventus; it is nevertheless the duty of the sheriff to detain the defendant if he surrender himself, or if he be surrendered by his bail before the return of the writ; and the sheriff is entitled to his poundage as on an ordinary arrest.

MAGNAY and another, Esquires, v. MONGER.

DEBT by the plaintiffs, as the sheriffs of London, on the statute 29th of *Eliz.* c. 4, to recover their poundage on the execution of a writ of *capias ad satisfaciendum*, issued by the defendant on a judgment by him against one *Brokenshir*. The declaration was in the usual form, and stated that the said writ, before the delivery thereof to the plaintiffs as such sheriffs as aforesaid, was indorsed by the defendant with a direction to the plaintiffs as such sheriffs as aforesaid, to satisfy 216*l.*, and interest thereon; and that the said writ so indorsed afterwards, to wit, &c., was delivered to the plaintiffs, being the sheriffs of the city of London as aforesaid, to be executed in due form of law, and that by virtue of the said writ, and in pursuance of the command therein contained, the plaintiffs being such sheriffs as aforesaid, afterwards, and before the return thereof, took and arrested the said *Brokenshir* by his body, and had and detained him in their custody.

Pleas: 1. That the said writ of ca. sa. was not indorsed by him, the defendant, as in the declaration alleged. 2. That the said writ was not delivered to the plaintiffs to be executed in due form of law, in manner and form, &c. 3. That at the time of the delivery of the said writ to the plaintiffs as such sheriffs as aforesaid, the said writ was indorsed with a direction to the plaintiffs, as such sheriffs as aforesaid, to return that the said *Brokenshir* was not to be found in their bailiwick, as such sheriffs as aforesaid, and that the said plaintiffs as aforesaid, before they took and arrested the said *Brokenshir*, were required and directed by the defendant not to take or arrest him the said *Brokenshir* under or by virtue of the said writ.

Replication. As to the 1st and 2nd pleas, similiter.

As to the 3rd plea, that the plaintiffs, before they took or arrested the said *Brokenshir*, were not required or directed by the defendant not to take or arrest him the said

Brokenshir under or by virtue of the said writ, in manner and form, &c.

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The action was tried before *Wightman J.*, at the sittings in Trinity term, 1842, when it appeared that *Brokenshir* had been held to bail in the action brought against him by the defendant *Monger*, who, with the view of proceeding against the bail in the action, issued a ca. sa. on the 8th November, and left it at the office of the sheriffs of London, on that day, indorsed to be returned "non est." On the following day *Brokenshir* came with his attorney to the office of the sheriff and surrendered himself as the person against whom the capias was directed, and was detained by the sheriff and taken to Whitecross Street. It was proved, by a witness from the Secondaries Office, that it is the practice of the office not to issue warrants on these writs, but that they are entered in a book for the inspection of the public; and, if the defendant came and surrendered himself, the practice is to detain him, notwithstanding the entry in the book of "non est inventus." A verdict was found for the plaintiff, upon this evidence, for 7*l.* 18*s.*, and leave was given to the defendant to move to enter a verdict for defendant on the 2nd and 3d pleas.

Humfrey in the same term obtained a rule nisi accordingly.

W. H. Watson shewed cause. The question is, whether the sheriff is entitled to poundage when the surrender is voluntary on the part of the defendant. When the sheriff has a writ of capias ad satisfaciendum delivered to him, with an indorsement upon it to be returned non est inventus, for the purpose of proceeding against the bail, if the defendant is already in his custody, he is bound to detain him, and the bail are discharged; *Forsyth v. Marriott* (a), *Burks v. Maine* (b). If the debtor is in the custody of the sheriff, even upon a criminal charge, the bail are dis-

(a) 1 N. R. 251.

(b) 16 East, 2.

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charged; *Ward v. Brumfit* (a). To return non est inventus under such circumstances would be a false return; *Burks v. Maine* (b). After judgment obtained against the principal, the bail were originally bound to render on demand, but, in favour to the bail, the issuing of the ca. sa. was considered as notice to them of the intention of the plaintiff to proceed against the body of the debtor, and they were bound to render him before the return of the writ; *Underhill v. Devereux* (c). The leaving of the ca. sa. at the office of the sheriff is notice to the bail, but the return need not be filed until the plaintiff, in scire facias, is called upon to put in a replication to the plea, that no capias ad satisfaciendum was returned and filed before the teste of the scire facias; *Hunt v. Cox* (d). But, if the party surrender while the writ is in the office of the sheriff, he is bound to detain him. In the present case the defendant comes and says, "I surrender;" the sheriff could not refuse to take him without making himself liable to the bail. The issue on the first plea is clearly in favour of the plaintiffs, for the writ was indorsed by the defendant with direction to the plaintiff to satisfy 206*l.* and interest. The second plea is, that the writ was not delivered to the sheriff to be executed in due form of law. But the writ was to be executed in the manner in which writs of ca. sa. are executed when the plaintiff intends to proceed against the bail, and the evidence shewed the practice of the office to be to enter the writ with the return, non est inventus, in the books kept in the office, and to issue no warrant upon it, but if the defendant came and surrendered himself to detain him. The third plea is, that the sheriff was required by the plaintiff not to arrest the defendant *Brokenshir*. The only proof of this was the indorsement on the writ, "to be returned, non est." But that was a direction that the sheriff, under the circumstances, would not have been justified in obeying. The effect of such indorsement is in

(a) 2 Mau. & S. 238.

(b) 16 East, 2.

(c) 2 Saund. 71 c, note 2.

(d) 3 Barr. 1360.

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truth only notice to the sheriff that the plaintiff intends to proceed against the bail, and that he is to issue no warrant on the writ. The sheriff is not bound to look for the defendant; but, if he comes voluntarily he can not refuse to detain him. If he had refused to detain the defendant, the sheriff would have been liable to an action at the suit of the bail, or of the plaintiff in the action for an escape. And as the sheriff could not return non est inventus, if the defendant had actually been in his custody, so if he came while the writ was in the office, and surrendered, the sheriff was obliged to detain him, and in default would be liable for an escape, and is therefore entitled to his poundage for the arrest.

Humfrey for the defendant. What took place after the delivery of the writ to the sheriff, with the direction to be returned non est inventus, is immaterial. The rule is, that the sheriff may return non est inventus in every case, except where the defendant is actually in his custody; *Sil-litoe v. Wallace* (e). As to the liability of the sheriff to an action for a false return, the plaintiff is estopped from bringing such an action against the sheriff, where he has himself directed him to return non est inventus. The writ of *capias* is only notice to the bail of the intention of the plaintiff to proceed against them, but, when directed to be returned non est inventus, it is authority to the sheriff not to arrest, and the plaintiff cannot be compelled to proceed to take the defendant. [*Patteson J.* The bail may render him, or he may render himself.] But then the plaintiff should have the option of proceeding or not till the end of the term; if the defendant renders himself the plaintiff is not obliged to go on. [*Patteson J.* If he renders himself before *capias* there might be an option, but if after *capias*, he is in custody under the writ.] The second issue is, that the writ was not delivered to the plaintiffs as such sheriffs, to be executed in due course of law. This must be found

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for the defendant, for the writ was in fact delivered to the sheriffs, with directions not to execute it, but to return non est inventus; and the third plea is also proved, for the indorsement on the back of the writ, to be returned non est inventus, was a requisition and direction to the sheriff not to take and arrest *Brokenshir*.

Lord DENMAN C. J.—If the plaintiffs, the sheriffs, did in point of fact arrest *Brokenshir*, they were entitled to their poundage on the arrest, and must recover in this action. The third plea alone is material; it is, that at the time of the delivery of the writ to the plaintiffs, as such sheriffs, it was indorsed with a direction to the plaintiffs to return that *John Brokenshir* was not to be found in their bailiwick, and that the plaintiffs, before they took and arrested the said *John Brokenshir*, were required and directed by the defendant not to take and arrest him. There was an indorsement on the writ, to be returned non est inventus; and, if this is to be intended as an absolute direction to the plaintiffs to do so under all circumstances, the plea would not be good; for, if *Brokenshir* were in custody, or if he surrendered while the writ was in the office, the sheriff would be bound to receive and detain him, and could not make any such return. But if the instructions are to be taken in the sense of not going to look after him, but to rest on their oars, then the plaintiffs were not required not to arrest, but only not to look after *Brokenshir*, for the purpose of arresting him. And this is the real meaning of the direction implied by the indorsement on the writ; and in that sense the plaintiffs were not required and directed by the defendant not to take, but only not to look after *Brokenshir*, and the issue is properly found for them.

PATTESON J. The meaning of the indorsement on the writ, to be returned non est inventus, is only that the sheriff is to take no steps to arrest. But if the defendant

surrender, the sheriff must take and accept him; he cannot refuse to receive him. Here there is no instruction to the sheriff not to receive *Brokenshir*, which is the real meaning of this plea, but only to return non est inventus. The party has a right to surrender himself in discharge of his bail, and the bail have a right to render the defendant in their own discharge, and, if this is done while the capias is in the hands of the sheriff, the defendant is arrested under the writ, and the sheriff cannot return non est inventus.

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WILLIAMS J. The sheriff is not to be perplexed by doubtful, half-contradictory instructions on the back of the writ. Here the writ is to be returned non est inventus; that is, if the sheriff can make such a return. This does not amount to instructions not to receive the defendant, if he come and surrender himself, but only that the sheriff is not to go and seek after him. But if he have him already, or if the defendant comes to the sheriff, and says, "Here I am, take me," the sheriff cannot refuse, and return non est inventus; he is bound to detain him, and, if so, he is entitled to his poundage on the arrest.

WIGHTMAN J. The plaintiffs are clearly entitled to recover on the second and third issues. The second plea is, that the writ was not delivered to the plaintiffs to be executed in due form of law. Now it would be executed in due form of law, by the sheriff returning non est inventus, if the defendant was not in fact in his custody, or if he did not surrender while the writ was in the office. But if the defendant came in and surrendered, then the execution, in due form of law, is for the sheriff to take him and to keep him. If the sheriff were to let him go after that, and to return non est inventus, he would make himself liable. Then, on the third issue, there is no direction on the writ not to take and arrest. The meaning of the indorsement, "to be returned non est inventus," is only for the sheriff not to look after the defendant. But, if he come in, the sheriff

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cannot refuse to take him; on the contrary, he is bound to take, and keep him when he has taken him. If the sheriff were to let him go, the plaintiff would be in this situation, he could not fix the bail, for there would have been a surrender, neither could he retake the defendant. The sheriff is therefore bound to receive him, and liable if he refuse to do so, and therefore clearly entitled to his poundage.

Judgment for plaintiffs.

ROBINS v. VISCOUNT MAIDSTONE.

June 1st.

Assumpsit by indorsee against the maker of a promissory note payable to *P. B.* Plea. That the note was delivered to *P. B.* by the maker without consideration, and in order that *P. B.* might raise money thereon in the maker's behalf; that the plaintiff advanced upon the security of the note a certain small sum of money, to wit, 200*l.*, and no more, and the note was therefore indorsed by the said *P. B.* to the plaintiff; that afterwards and before the commencement of the suit, the plaintiff was paid and satisfied by the defendant all the money by him so advanced as aforesaid, and all his right, title and cause of action upon and in respect of the same. The replication denied the payment and satisfaction.

ASSUMPSIT by plaintiff as indorsee of two promissory notes dated 1st October 1842, and made by the defendant, payable to *John Phillip Beavan* or order, four months after the date thereof, the one being for 1160*l.* 15*s.*, and the other for 1050*l.* 15*s.* 6*d.*, and indorsed by him to the plaintiff.

4th plea, that the said promissory note in the said first count mentioned, was made by him the defendant, and delivered to the said *J. P. Beavan* without any value or consideration whatever as between the defendant and the said *J. P. Beavan*, and in order that the said *J. P. Beavan* might raise money thereon for and on behalf of the defendant, and not otherwise, and that there never was any consideration or value whatever given by the said *J. P. Beavan*, or received by the defendant for the said delivery of said note to the said *J. P. Beavan*, nor had he the said

note was therefore indorsed by the said *P. B.* to the plaintiff; that afterwards and before the commencement of the suit, the plaintiff was paid and satisfied by the defendant all the money by him so advanced as aforesaid, and all his right, title and cause of action upon and in respect of the same. The replication denied the payment and satisfaction.

At the trial the defendant gave no evidence in support of his plea, and the jury found a verdict under the direction of the judge for the whole amount of the note: *Held*, that the direction was right, and that the defendant could not avail himself of the admission in the pleadings, that only 200*l.* had been advanced, to limit the plaintiff's right to recover to that sum.

When a plea consists of two material allegations, one of which is traversed, and found against the defendant, the whole plea fails.

J. P. Beavan at any time any claim or demand against the said defendant upon or in respect of the said note; and the defendant further saith, that after the making of the said note, and before any indorsement thereof by the said *J. P. Beavan*, to wit, on the said 1st October, he the said *J. P. Beavan*, for the purpose aforesaid, applied to and requested the plaintiff to make an advance of money upon the security of the said note. And the defendant further saith, that the plaintiff then thereupon advanced upon the security of the said note a certain small sum of money only, to wit, 200*l.* and no more, and the said note was then thereupon indorsed and delivered by the said *J. P. Beavan* to the plaintiff. And the defendant further saith, that except as aforesaid there never was at any time existing any consideration or value whatever for the said making or indorsing of the said note, or for the payment thereof. And the defendant further saith, that afterwards, and before the commencement of this suit, the plaintiff was duly paid and satisfied by the defendant all the money by him so advanced as aforesaid, upon the security of the said note, and all his the plaintiff's right, title and cause of action upon or in respect of the said promissory note, &c.

Replication. And as to the plea of the defendant by him fourthly above pleaded, the plaintiff saith that he was not paid or satisfied by the defendant the money by him the plaintiff so advanced upon the security of the said note in the first count mentioned, and his the plaintiff's right, title and cause of action upon and in respect of the said promissory note in manner and form as in that plea is alleged, &c.

With respect to the other count there was a similar plea, alleging that only 150*l.* had been advanced, and a similar replication.

At the trial before *Wightman J.* at the sittings during this term, no evidence was offered on the part of the defendant, and the plaintiff had a verdict for the full amount of the notes.

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Thesiger, for the defendant, now moved to reduce the damages to 200*l.* on the one note, and to 150*l.* on the other, or for a new trial for misdirection. The plaintiff has admitted by his replication that 200*l.* and no more has been advanced on the first note, and 150*l.* and no more on the second, and he has taken issue on the satisfaction of that sum. If he intended to recover more than these sums, he should have shewn how much more had been advanced, otherwise he will only be entitled to that amount, for the parties have agreed to limit the inquiry to whether the money mentioned in the pleas has been satisfied. This case is free from the hardship pointed out by *Alderson B.* in *Smith v. Martin (a)*, for the whole facts stated in the plea are within the plaintiff's knowledge if true; the plaintiff must have known whether in fact he had advanced only 200*l.* on the one note, and 150*l.* on the other, and he might have denied that he advanced no more than those sums, but he has chosen to deny the repayment of them by the defendant. In *Bingham v. Stanley (b)* the plea was, that the check was made by defendant, and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. The plaintiff replied that it was delivered to plaintiff for a good consideration; and the court held that the illegal making of the check was so admitted on the pleadings as to throw on the plaintiff the onus of proving the consideration. Lord *Denman C. J.* there, in delivering the judgment of the Court, says, "We think that an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause." The plaintiff has therefore admitted an advance of 200*l.* and no more on this note, and cannot be entitled to recover the whole sum. It is true that the sum in each plea is laid under a videlicet, but it is a material allegation, and the manner of stating it

(a) 9 M. & W. 308.

(b) 2 Q. B. 117; S. C. 1 G. & D. 237.

cannot make it otherwise : *Grimwood v. Barrit* (a), *Monks v. Lahee* (b). The allegation was therefore traversable, and not being traversed was admitted by the plaintiff; besides the words and *no more*, fix the amounts and limit them to 200*l.* and 150*l.* respectively. Here it is as if there had been two separate pleas, and but one replication, so that one plea only is answered. [*Wightman J.* The defendant has joined issue on the payment, and it is found against him, and the whole plea goes with it. The admission contained in the plea is only available for the purpose of the plea, and, if a material allegation which has been traversed is found against the defendant, the whole plea is gone, there is an end of it.]

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Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court in the following vacation, (June 20).—This was an action upon two promissory notes made by the defendant, brought by the plaintiff as indorsee. The defendant pleaded, as to the first note, that it was given to the payee to raise money for the defendant by way of discounting, that this was not done, and afterwards the plaintiff advanced 200*l.* and no more on the security of that note, which was indorsed to him, and that the 200*l.* so advanced had been paid. The replication traversed that the 200*l.* so advanced had been paid. There was a similar plea and replication to the other note. On this issue, the defendant offered no evidence of payment, and the plaintiff had a verdict for the full amount of the notes. A motion is now made for a new trial, unless the plaintiff will consent to reduce the verdict to 200*l.*, which is grounded upon the supposition that the plaintiff, by denying only the payment of the 200*l.* so advanced, has admitted that no more was advanced, and therefore can recover no more. For this position, the case

(a) 6 T. R. 460.

(b) 3 Bing. N. C. 408.

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of *Bingham v. Stanley* (a) was cited, in which the Court held, "that an admission made in the course of pleading, whether in express terms, or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause, whether the facts relate to the parties or to third persons, provided that the allegation so made be material."

In the Exchequer, in the subsequent case of *Smith v. Martin* (b), expressions are used not agreeing with other expressions used by this Court in *Bingham v. Stanley* (a), yet, looking to the facts of both the cases, it will be found that there was no real difference of opinion between the Courts. The expression in *Bingham v. Stanley* (b), "for all purposes of the cause," is not strictly correct, for, as it stands, it might be supposed that it extended to other issues joined in the cause, as well as that which arises out of the particular pleading, one allegation of which is traversed; it would have been more correct to have said, "for all purposes regarding the issue arising from that pleading."

For instance, in this particular case, if the defendant had proved the payment which he alleged, it would not have been competent to the plaintiff to have given evidence that more had been advanced: if he had wished to have done so, he ought to have traversed the allegation that no more had been advanced, and perhaps shewn how much more. But where a plea consists of several material allegations, one of which is traversed, and found for the *plaintiff*, there is an end of the plea altogether, and the defendant can take no advantage of that part which was not traversed. The defendant sustains no injury, for he has pleaded that which is false, viz. the payment. If in truth 200*l.* only was advanced, he should have so pleaded, adding a payment into Court of the amount due, and then the plaintiff would have been obliged either to take the sum paid in with costs in discharge of the action, or to have replied that more was

(a) 2 Q. B. 117; S. C. 1 G. & D. 237.

(b) 9 M. & W. 304.

due, at the peril of having a verdict against him, if he failed to prove it. We think that the verdict is quite right, and that the rule must be refused.

Rule refused.

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BRIGHT v. BEARD.

Friday,
June 2d.

ASSUMPSIT. The declaration was dated the 16th of February, 1842, and stated that heretofore, to wit, on the 21st September, 1840, by a certain agreement then made between the plaintiff and the defendant, it was agreed in manner following; that is to say, "Memorandum of agreement made this 21st day of September, 1840, between Mr. *Richard Bright*, of, &c., of the one part and *Richard Beard* of the other part. The said *R. Bright* agrees to let, and the said *R. Beard* agrees to take, all that dwelling-house now in the occupation of Mr. *Henry Dimsdale*, No. 138, Holborn Bars, from the 29th September instant, at the rental of 100 guineas per annum; the said *R. Bright* to be entitled to recover possession and the said *R. Beard* to be at liberty to quit possession upon giving a quarter of a year's notice, but not until the expiration of the first three quarters of a year, that is to say, neither party will be at liberty to avail himself of such right before Midsummer next. It is understood that in the event of the said *R. Beard* making any alteration in the house, he is to restore the same to its present state, if required to do so, on quitting possession."

Averment of mutual promises.

The declaration then alleged as a breach: that although the defendant hath never given notice of his intention to quit and deliver up possession of the said dwelling-house and premises, and although a large sum of money,

Assumpsit on an agreement, bearing date the 20th of September, 1840, whereby the defendant agreed to take of the plaintiff certain premises, from the 29th of September instant, at the rental of 100 guineas per annum. The declaration was dated the 16th February, 1842, and averred that a large sum of money, to wit, the sum of 210*l.* of the rent aforesaid, for a long period of time, to wit, for two years, elapsed after the making of the said agreement, became and was due and in arrear.

ment; and 2dly, except as to the said sum of 105*l.*, parcel, &c., that no part of the said rent, except the said sum of 105*l.*, parcel, &c. had become or was due or payable under the agreement at any time before the commencement of the suit.

Held, on special demurrer to the second plea, that it was sufficiently certain to what portion of the rent that plea was pleaded, and that the plea was good.

Plea: 1st,
as to 105*l.*,
parcel, pay-

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to wit, the sum of 210*l.* of the rent aforesaid, for a long period of time, to wit, two years, elapsed after the making the said promise and agreement, and before the commencement of this suit, became and was due and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the said agreement, and the promise of the defendant so made as aforesaid, the defendant hath not paid the said sum of money last above mentioned, or any part thereof, &c.

Pleas: 1. as to 105*l.*, parcel, &c. payment. 2. (Except as to the said sum of 105*l.*, parcel of said rent in the declaration mentioned,) that no part of the said rent in the said declaration mentioned, (except the said sum of 105*l.* parcel, &c.) had become or was due or payable, according to the tenor and effect of the said agreement, at any time before or at the commencement of this suit, in manner and form as in said declaration in that behalf alleged, and of this the said defendant puts himself upon the country, &c.

Special demurrer, assigning as grounds that the plea amounts to an informal and inartificial mode of pleading *riens en arriere*, which is, according to the existing rules of pleading, an insufficient plea to this action. That the said plea, having admitted the contract declared on, is further defective, in not disclosing affirmatively and specifically under what circumstances and wherefore no part of the said rent in the declaration mentioned, except the said sum of 105*l.*, parcel, &c. had become or was due or payable, according to the tenor and effect of the said agreement, at any time before the commencement of this suit, as whether in consequence of eviction or surrender, or of the time for payment of the said rent not having elapsed by effluxion of time, and that inasmuch as the non-accrual due of the said rent might have happened from either of those or from other causes, the defendant ought to have shewn with certainty from what precise cause such non-accrual arose; and that the plea ought to have shewn specifically and distinctly to what part and proportion of the time, which had elapsed after the making of the said demise, the said sum

of 105*l.* and the said last plea respectively applied, and the defendant ought, in pleading to a part of the declaration, and to a part of the rent thereby claimed as he had done, to have shewn precisely for how much of the time in respect whereof rent is by the declaration claimed to have accrued due to the plaintiff, and up to what precise period the defendant intends by his plea to bar the plaintiff's remedy and to answer the declaration. That the plea, while attempting to deny a liability to pay some part only of the rent claimed by the declaration, does not shew any apportionment of the same rent, or how a part thereof could become due and not the other part, or how a part thereof could become discharged and not the other part.

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Bovill in support of the demurrer. Two years' rent are claimed on the face of the declaration; the plea in effect only answers one of them; and it is uncertain, for it does not shew to which year's rent it is intended to apply. If the plea goes only to part, it must ascertain the part of the declaration to which it is applied, as in debt for rent for several years, if the defendant says quoad 20*l.* parcel of the rent nil debet, and does not shew when the 20*l.* was due (a): *Kighley v. Buckley* (b). Here the defendant does not distinguish by his plea which year's rent the plea is intended to meet; this is important with a view to the trial; for if the defendant had two answers to one year's rent, and no answer to the other, and did not specify in his plea to which year's rent the answer pleaded was intended to apply, each answer might be applied to a different year at the trial. [*Patteson J.* Your declaration shews on the face of it that there is but one year's rent due; the date of the agreement is September, 1840, and that of the declaration February, 1842, at that time two years had not elapsed.] There is an allegation in the declaration that rent was due for two years elapsed after the making the promise, and, if there is

(a) Com. Dig. Pleader, (E 27).

(b) 1 Sid. 338.

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any repugnancy in the dates, that would only be ground of special demurrer, and the Court will give effect to the allegation and not consider the repugnancy of the dates. [*Patteson* J. The principle of the case in *Comyns* is, that several sums were due in respect of rent; here the declaration shews there is only one.] Assuming only one year to be due, the plea is still bad, for it confesses two, and only professes to answer one, but does not distinguish the one for which it is intended as an answer. The defendant pleads, except as to 105*l.* parcel, &c., that no part except 105*l.* parcel, &c. was due at any time before the commencement of the suit. This is in effect *riens in arriere*, which cannot be pleaded to an action for the breach of an agreement for the payment of rent, but the plea ought to shew by what means there was no rent in arrear, whether by payment of the rent as it became due under the agreement, or that the time of payment had not arrived: *Baden v. Flight* (a).

Robinson contra. The defendant as to one year's rent pleads payment; that the plaintiff has; and as to all, except the one year, that it had never become due. So that as to one year's rent there is a complete answer on the record, and on the face of the declaration one year only is due. It is said that the defendant ought to have demurred, but it is not clear that he could have done so; the averment in the declaration is under a *videlicet*, that a large sum of money, to wit, 210*l.* of the rent aforesaid, for a long period of time, to wit, two years, became and was due, and still is in arrear and unpaid. If the declaration is uncertain, the plea will necessarily be so too. In *Kighley v. Bulkley* (b) the declaration specifies the rent gone for to be for several years. But the rule laid in *Comyns' Digest*, Pleader, (E 27), is not confined to a demand for rent, but extends to all actions of assumpsit: *Swinburne v. Ogle* (c).

(a) 3 Bing. N. C. 685.

(b) 1 Sid. 338.

(c) Lutw. 239.

Neither is it now law that, if a party plead to a portion of a whole demand, he must in all cases specify the particular portion to which he intends to apply it. This attempt to bring back the strictness of old pleading was tried in *Mee v. Tomlinson* (a), and *Lorymer v. Vizeu* (b), which cases have been since overruled: *Mitchell v. Townley* (c), *Noel v. Davis* (d), *Kingham v. Robins* (e). Therefore the defendant need not specify the precise portions of the sum claimed in the declaration, to which the plea applies. Riens in arriere may be a bad plea to an action on a covenant for payment of rent, as the defendant would thereby confess the covenant broken, and the plea would be in mitigation of damages only, but to an action of debt for rent it was always a good plea. But this is not a plea of riens in arriere; it is in effect that the rent never had been in arrear. The words of the plea are, that no part of the rent *had become* due. It is like the distinction between nil debet and nunquam indebitatus. *Baden v. Flight* (f) was in covenant, and *Tindal C. J.* there says, "The substantial allegation is, that the rent became due *during* the term; it is no answer to that allegation to say that the rent did not become due at a particular day." [*Patteson J.* If the action were for use and occupation, there would be no difficulty. Here you plead payment as to part, but non assumpsit will not reach the residue on account of the special agreement.] But, if the plea is bad, the defendant is entitled to the benefit of the defect in the declaration, for the plaintiff cannot have judgment to recover more than the 105*l.* The plaintiff can only have judgment for the breaches which are well assigned, *Pinkney v. Inhabitants de Rotel* (g), and the Court may and ought ex officio to give such judgment on the whole record as ought to be given: *Le Bret v. Papil-*

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(a) 4 A. & E. 268; S. C. 5 Nev. & M. 624.

(b) 3 Bing. N. C. 322.

(c) 7 A. & E. 164.

(d) 4 M. & W. 136.

(e) 5 M. & W. 94.

(f) 3 Bing. N. C. 685.

(g) 2 Wms. Saund. 379 a, n. 14.

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lon (a). [*Patteson J.* How can we enter judgment upon this plea, that the plaintiff cannot recover more than 105*l.*?]

Bovill in reply. This is *assumpsit* for damages, and the plea in *Baden v. Flight* (b) is in substance the same as here, that no rent ever became due. [*Patteson J.* It is that no rent became due on a particular day.] But the plea is uncertain; it does not shew what portion of the rent is confessed, nor does it avoid it.

LORD DENMAN C. J.—This declaration is dated the 16th of February, 1842, and it sets out at length an agreement made the 21st of September, 1840, between the plaintiff of the one part and the defendant of the other, whereby the plaintiff agrees to let, and the defendant agrees to take, a certain dwelling-house therein described, from the 29th of September then instant, at the rent of one hundred guineas per annum. Then, after averring mutual promises by the plaintiff and defendant, it proceeds, that although a large sum of money, to wit, the sum of 210*l.* of the rent aforesaid, for a long space of time, to wit, two years, elapsed after the making of the said promise and agreement, and before the commencement of the suit, became and was due, and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the agreement and the promise of the defendant, yet the defendant hath not paid the said sum of money last mentioned, nor any part thereof. Whether this statement of the declaration might not have been demurred to, is not the question, but it is clear from the dates that two years' rent could not have been due at the commencement of the suit. The defendant, however, instead of demurring pleads as to 105*l.* parcel payment, and for a further plea, except as to the said sum of 105*l.* parcel, that no part of the said rent

(a) 4 East, 503.

(b) 3 Bing. N. C. 685.

in the declaration mentioned, except the said sum of 105*l.* parcel, &c. had become or was due or payable, according to the tenor and effect of the said agreement, at any time before the commencement of the suit. It is said that this is a bad plea, if so, it would be extraordinary, for it puts forth distinctly what the defendant means, and is a denial that any thing had become due in respect of rent before the commencement of the suit, except what had been already covered by the plea of payment. The decision in *Baden v. Flight* (a) is not inconsistent with this. The allegation there was, that during the term two quarters' rent became due, which was clearly not answered by saying that no rent became due on a particular day. Perhaps what comes after, in the subsequent part of the judgment, with respect to the plea of *riens in arriere*, is not accurately reported.

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PATTESON J.—There is no necessity for us to overrule the case in *Comyns*. The plea there is as to 20*l.* parcel of rent for several years, and it is not certain to what part it is intended to apply. But there can be no want of certainty in this plea to this declaration, from the dates, for two years had not elapsed from the time of the commencement of the holding. The defendant pleads payment as to part. Since the new rules, what other plea could he have put on the record as to the other part? He could not have pleaded as to part payment, and non assumpsit as to the residue, because non assumpsit only puts in issue the particular contract. He was therefore obliged to plead specially, and he pleads a plea denying that any rent had become due, except the one year's rent, which had been covered by the plea of payment. Perhaps the declaration might have been bad, if the defendant had demurred.

WILLIAMS J.—I am of the same opinion. 'The plaintiff has brought the difficulty on himself by the allegation at

(a) 3 Bing. N. C. 685.

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Jon (a). [*Patteson J.* How can we enter judgment upon this plea, that the plaintiff cannot recover more than 105*l.*?]

Bovill in reply. This is *assumpsit* for damages, and the plea in *Baden v. Flight (b)* is in substance the same as here, that no rent ever became due. [*Patteson J.* It is that no rent became due on a particular day.] But the plea is uncertain; it does not shew what portion of the rent is confessed, nor does it avoid it.

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(a) 4 East, 503.

(b) 3 Bing. N. C. 685.

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PATTESON J.—There is no necessity for us to overrule the case in *Comyns*. The plea there is as to 20*l.* parcel of rent for several years, and it is not certain to what part it is intended to apply. But there can be no want of certainty in this plea to this declaration, from the dates, for two years had not elapsed from the time of the commencement of the holding. The defendant pleads payment as to part. Since the new rules, what other plea could he have put on the record as to the other part? He could not have pleaded as to part payment, and non assumpsit as to the residue, because non assumpsit only puts in issue the particular contract. He was therefore obliged to plead specially, and he pleads a plea denying that any rent had become due, except the one year's rent, which had been covered by the plea of payment. Perhaps the declaration might have been bad, if the defendant had demurred.

WILLIAMS J.—I am of the same opinion. The plaintiff has brought the difficulty on himself by the allegation at

(a) 3 Bing. N. C. 685.

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the close of the declaration, "that although a large sum of money, to wit, 210*l.* of the rent aforesaid, for a long space of time, to wit, two years, elapsed after the making of the promise, became and was due," &c. The dates are inconsistent with this, but I will not undertake to say that the defendant could have trusted to that, there being a direct allegation that two years' rent was due. But however he does not demur; he defends himself not by a plea of *riens en arriere*, but by saying except one year's rent which I have paid, no part of the said rent had become due before the commencement of the suit, and so he gets rid of the whole demand. I think the plea is certain enough.

COLERIDGE J.—My judgment proceeds upon the averments contained on this particular record. It is clear here from the dates, that no more than one year's rent could have been due. That claim is fully answered by the plea of payment, and a denial that any more than that year had become due. I do not say that such a plea may not be bad in many cases, for it may under circumstances be necessary to specify to what portion of the demand the plea is intended to apply, and in that case a similar plea would be bad. But there is no uncertainty in this plea, which does in effect so specify. It is not therefore necessary to overrule the case in *Siderfin*. But getting rid of that objection, the plea is certainly free from the objection in *Flight v. Baden* (a).

Judgment for the defendant.

(a) 3 Bing. N. C. 685.



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DE BERNARDIS v. SPALDING.

Friday,
June 2nd.

ASSUMPSIT on a promissory note for 1080 francs, made by the defendant at Brussels, dated the 29th of October, 1842, and payable the 20th of November in the same year.

Plea: That the said note was made and delivered in parts beyond the seas, to wit, at Brussels, in the kingdom of Belgium, and that at the said time of the making and delivery thereof, and also at the time of the making of the agreement, and of the making of the loan and advance in this plea mentioned, the law of the said kingdom of Belgium was, and from these times respectively hitherto has been, and still is, "that no person shall take, or receive, or agree to take or receive for the forbearance, or for the giving day of payment of any sum lent or advanced, or agreed to be lent or advanced, any sum of money exceeding the rate of 5 francs of the money of the said kingdom of Belgium for the forbearance of 100 francs of the money of the said kingdom of Belgium for a year, and that all agreements for the payment of any sum exceeding the rate of such 5 francs for the forbearance of such 100 francs for a year were and are void; and that no person lending any sum of money upon an agreement whereby he is to receive for the forbearance thereof a sum exceeding the rate of such 5 francs for the forbearance of such 100 francs for a year, can recover from the person to whom the same may be lent, either the sum so lent, or the sum exceeding the rate aforesaid, agreed to be paid for the forbearance thereof, or any part of either of such sums. And that all

Assumpsit against defendant as maker of a promissory note. **Plea,** that the note was made at Brussels, and that the law of Belgium is, that no person can take, or receive, or agree to take or receive more than 5*l.* per cent. for the forbearance of money lent or agreed to be lent, and that all agreements for the payment of any interest exceeding that rate, and all promissory notes made in order to secure the payment of any sum of money lent upon such an agreement are wholly null and void. It then stated an agreement between the plaintiff and defendant in Belgium, that the plaintiff

should lend money to the defendant on an usurious contract, and the making of the note to secure the loan in pursuance of such contract. **Replication,** that the rate of interest in Belgium is not by the law of Belgium restricted to 5*l.* per cent., nor by the law of Belgium are notes made to secure the payment of money lent on agreement to pay more than 5*l.* per cent. interest, null and void, nor did the defendant make, or the plaintiff receive, the promissory note on terms contrary to the law of the said kingdom of Belgium, in manner and form. **Held,** on special demurrer, that the replication was not double or uncertain.

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promissory notes whatsoever made in order to secure (whether by itself or amongst other sums) the payment of any sum of money lent upon an agreement, whereby the person lending is to receive for the forbearance thereof a sum exceeding the rate of such 5 francs for the forbearance of such 100 francs for a year, or to secure (whether by itself or amongst other sums) the payment of such sum exceeding the rate aforesaid agreed to be paid for such forbearance, are wholly null and void, and that no part whatever of the sum mentioned and promised to be paid in any of such notes can be recovered from the party making the same. And the defendant says, that before the making of the said note, and while the plaintiff and defendant were both residing in the said kingdom of Belgium, and subject to the laws thereof, to wit, on the 29th day of October, in the year of our Lord 1842, it was agreed between the plaintiff and the defendant that the plaintiff should lend and advance to the defendant a certain sum of money of the said kingdom of Belgium, to wit, the sum of 540 francs, and that the plaintiff should forbear and give day of payment of the said sum of 540 francs, from the time of lending and advancing the same until a certain other day, to wit, the 20th day of November, A. D. 1842, in the said note mentioned, and that for forbearing and giving day of payment of the said sum of 540 francs, the defendant should pay to the plaintiff a certain sum of money of the said kingdom of Belgium, to wit, the sum of 540 francs; and that for securing the repayment of the said sum of 540 francs so to be lent and advanced, together with the said sum of 540 francs so to be paid for the forbearing and giving day of payment of the said 540 francs, the defendant should make the said promissory note. And the defendant says, that in pursuance of the said agreement, the plaintiff did afterwards, to wit, on the said 29th day of October, in the year of our Lord 1842, lend and advance the said sum of 540 francs to the defendant, and the defendant did then, for securing the payment of the said last mentioned sum, as

also the payment of the said other sum of 540 francs, on the said 20th day of November, A. D. 1842, make the said promissory note, and the plaintiff then received the same on the terms aforesaid. And the defendant further says, that the said sum of 540 francs, so agreed to be given and paid to the plaintiff for such loan and forbearance, exceeds the rate of 5 francs of the money of the said kingdom of Belgium for the forbearance of 100 francs of the money of the said kingdom of Belgium for a year, contrary to the law of the said kingdom of Belgium, &c.

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Replication. That at the several times by the defendant in his plea in that behalf mentioned, the rate of interest for the forbearance or giving day of payment in the said kingdom of Belgium, was not by the law of the said kingdom of Belgium limited or restricted to 5 francs for the forbearance of 100 francs for a year, nor by the law of the said kingdom of Belgium were promissory notes made to secure the payment of moneys lent upon an agreement whereby the lender was to receive for forbearance a sum exceeding the rate of such 5 francs for the forbearance of such 100 francs for a year, or to secure the payment of such sum, exceeding the rate aforesaid for such forbearance, null and void, as the defendant hath above in his plea alleged, nor did the defendant make or the plaintiff receive the said promissory note on terms contrary to the law of the said kingdom of Belgium, in manner and form as the defendant hath above in that behalf alleged.

Special demurrer, assigning for grounds that the replication was double and uncertain.

Sir *J. Bayley* in support of the demurrer. The replication is double, for it puts in issue the law of Belgium as to usury, and the law of Belgium as to promissory notes, and the terms on which the note was given. The plea states the law of Belgium with respect to usury, and it then alleges the usurious contract, and that the note was made in pursuance of it. The plaintiff in his replication

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should have denied the law of Belgium as stated in the plea, or the contract on which the note was made. "The rule is, that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed:" *Parke J.* in *Selby v. Bardons*(a). The replication *de injuriâ* here would be improper. The plaintiff in his replication puts in issue both the law of Belgium and the terms upon which the note was made. It is therefore double: *Faulkner v. Chevell*(b), *Smith v. Dickson*(c). A traverse of the contract would have been a good answer to the whole plea: *Grimwood v. Barrit*(d). Therefore the traverse of both propositions is tantamount to a replication *de injuriâ*; *Griffin v. Yates*(e), which is only admissible where matters in excuse of the subject-matter of the action are pleaded, to answer which the whole of the facts composing the plea must be denied. But the plea is also bad for uncertainty, for it avers that the defendant did not make nor the plaintiff receive the note in terms contrary to the law of Belgium; this may mean either to deny the agreement on which the note was given, or to deny that the agreement was contrary to the law of Belgium. It is uncertain whether the plaintiff means to put in issue the law, or that the note was made contrary to it.

Whigham in support of the replication. It is not contended that the replication *de injuriâ* does apply here. But the issue here is single, involving only the law of the kingdom of Belgium. The replication denies that the rate of interest in Belgium is by the law of Belgium limited to 5 per cent., and that promissory notes made for securing payment of money lent at a higher rate of interest than 5 per cent. are void by the law of Belgium. This is in fact only a denial of the law of Belgium as stated in the plea. The

(a) 3 B. & Ad. 10.

(c) 7 Ad. & Ell. 1; S. C. 2 N.

(b) 5 Ad. & Ell. 213; S. C. 6
 N. & M. 704.

(d) 6 T. R. 460.

(e) 2 Bing. N. C. 579.

third allegation in the replication does not put in issue the agreement at all, but only avers that the note was valid by the law of Belgium. Thus the whole replication only tenders a single issue, though with two branches; the plaintiff in substance says, although there was an agreement to secure more than 5 per cent. on the loan, in pursuance of which the note was made, yet by the law of Belgium a note made in pursuance of such an agreement is not void. It denies the law of Belgium, as stated in the plea, with regard to interest on money advanced on loan, and with regard to promissory notes made to secure such interest, this is only a denial of the law of Belgium as stated in the plea. The reason of the rule against duplicity is, that it tends to several issues in respect of a single claim: *Stephens* on Pleading, 251. But no matter, however multifarious, which constitutes but an entire answer, will render a plea double; but here the several allegations constitute one single point of defence, namely, that the note is not void by the law of Belgium, as stated in the plea: *Robinson v. Rayley* (a). The latter proposition is not a traverse of the agreement to take more than 5 per cent. for the loan, and at most, taken in conjunction with what goes before, is immaterial matter, but this will not render the pleading double: *Regil v. Green* (b). Then if the plea is not double it is not uncertain.

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LORD DENMAN C.J.—I think the plaintiff has taken the right view of the replication; it in reality puts in issue the law of Belgium and nothing more.

PATTESON J.—The law of Belgium is stated with particularity in the defendant's plea, and the replication puts in issue the law only. If the plaintiff had in terms traversed the allegations in the plea as to the law of Belgium, it would have been equivalent to the assertion of the first two propositions of the replication; the third proposition

(a) 1 Burr. 316.

(b) 1 M. & W. 328.

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is mere surplusage. If the third proposition had put in issue the fact of making the agreement, in pursuance of which the note is stated to have been given, it would have been double. But, after denying the law of Belgium to be as stated in the plea, it only denies that the note was made on terms contrary to the law of the kingdom of Belgium. That is another mode of traversing the law of Belgium as alleged in the plea, or else it is an assertion that the note was not made contrary to some other law of Belgium not mentioned in the plea. It is either a repetition of the traverse or surplusage. If the law had been found at the trial to be as stated in the plea, the whole issue would have been proved.

WILLIAMS J.—Sir *J. Bayley* is not founded in stating that the two propositions in the plaintiff's replication, namely, that the rate of interest in the kingdom of Belgium is not, by the law of Belgium, limited to 5 per cent., and that promissory notes made to secure the payment of moneys lent upon an agreement to pay more than 5 per cent. interest are not null and void by the law of the said kingdom, make the plea double. Both together they only amount to a statement of the law of Belgium with respect to promissory notes given to secure the payment of money lent at more than 5 per cent. interest, namely, that such notes given are not void by the law of Belgium. Then as to the other proposition, that also is not an affirmation of a proposition distinct from the other. If the words, "the said law," had been introduced, perhaps it might have been so, for then the replication would have denied that the note was made on the terms of securing more than 5 per cent. interest, but the latter averment of the replication denies nothing alleged in the plea, but only alleges that the plaintiff made the note on terms generally, not contrary to the law of the kingdom of Belgium.

COLERIDGE J.—At one time I was inclined to take a

different view of the question, but now I think the replication one and single. To ascertain the character of the traverse in the replication, we must look at the plea. If the plea amounts to only one statement of the law of Belgium, though it states two propositions with regard to it, namely, that the law of Belgium does not permit a higher rate of interest than 5*l.* per cent., and that notes made in pursuance of an agreement for paying higher interest are void by the law of Belgium, then the replication is single, although it put in issue both these allegations, which in effect are only one allegation of the law of Belgium. The last averment in the replication may bear two meanings; either that the note was not made contrary to the law as thereinbefore stated, and then taken in connection with the first two allegations in the replication, it is only a repetition of the former traverse, or else it is an assertion that it was not made in terms generally contrary to the law of Belgium, when it will be found that there is no such averment in the plea, and either way it would be harmless on this demurrer.

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Judgment for plaintiffs.

THOMPSON v. BECK and another.

Saturday,
 May 27th.

THIS was an application to set aside an order made by *Coleridge J.* It appeared that on the 19th of April a summons was taken out before *Coleridge J.* for setting aside the writ of summons and subsequent proceedings in this cause for irregularity, which on the hearing was dismissed by the learned judge with costs, on the ground that the defendants' affidavits were not properly entitled. The defendants paid the costs the next day, and on the same day, having discovered an authority tending to shew that the original affidavits were sufficient, they took out a fresh

Where an order has been made by a judge at chambers, and an application is afterwards made to the same judge, instead of to the Court, to rescind his own order, which he entertains, but dismisses, the Court will not interfere to review his decision.

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summons before the same learned judge, for the purpose of inducing him to review his decision. This he refused to do, on the ground that it was too late to interfere after the defendants had paid the costs of the first application.

Martin shewed cause.

Humphrey in support of the rule.

LORD DENMAN C. J.—The defendants first pay the costs in compliance with the decision of the learned judge, and then they come to ask him to review his decision, and he refuses on the ground that they are too late. The question is, whether after this the defendants are entitled to come here. I think they are not. The defendants could not have appealed from the decision of my brother *Coleridge* to any other single judge; but, if they were dissatisfied with his decision, they ought to have applied to the Court to review it. Instead of doing that they go before him again, and thus they have substituted him for the Court, and cannot come here now.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.



Tuesday,
June 6th.

PRENTICE v. HARRISON and LAWRENCE.

Trespass for assault and false imprisonment. Plea of justification under a writ of ca. sa.

TRESPASS for assault and false imprisonment.

Plea: that *Lawrence* recovered judgment for 3*l.* 12*s.* debt, and 19*l.* 8*s.* costs, against the plaintiff, in the Court of Queen's Bench, and that a *capias ad satisfaciendum* was issued by defendant *Harrison*, as the attorney of the defend-

Replication, that the said writ was after the issuing thereof, and before the commencement of the suit, ordered to be set aside and was set aside by order of a judge:—*Held*, on special demurrer, that the replication was bad for not averring that the writ was set aside for irregularity.

ant *Lawrence*, upon the said judgment, and directed to the sheriff of Essex.

Replication: that the writ of *capias ad satisfaciendum* in the plea mentioned, after the issuing thereof, and before the commencement of the suit, was ordered to be set aside, and was set aside, by Sir *C. Cresswell*, Knight, then being one of the judges of the Common Pleas, by an order then made by him according to the practice in that behalf of the Court of Queen's Bench, by which order the said Sir *C. Cresswell* ordered that the said writ should be set aside. It then alleged that afterwards, and before the commencement of the suit, the said order was made a rule of the Court of Queen's Bench, and that always from the time of the making of the said order up to and at the time of the commencement of the suit, and thence hitherto, the said order remained and was in full force and virtue, and not in any manner altered, rescinded or made void.

Special demurrer, stating as grounds, that the replication is insufficient in not stating and shewing to the Court wherefore the order of the judge was made, and what was the ground for setting aside, and upon which was set aside the said writ of *capias*, and also that, if the same writ was set aside for any other cause than for irregularity, then the same plea is substantially defective and insufficient. And also that it does not state whether the order of the judge was made previously or subsequently to the execution of the said writ, because if the said writ was set aside for any other cause than irregularity, then it is essential to the validity of the replication that the order should have been made previously to the execution of the said writ, and that the defendants should, before and at the time of the execution of the said writ, have had knowledge and notice of the said order.

Butt in support of the demurrer. The ground upon which the writ of *capias ad satisfaciendum* was set aside should be stated on the face of the replication; if for irre-

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gularity it should be so stated, for the plaintiff must shew distinctly the ground upon which he makes the defendants trespassers. If any case can be suggested consistent with the facts stated in the replication, where the defendants would not be liable in trespass, the replication is bad for not expressly excluding that case. It is true that if the writ was void *ab initio* or irregular, that would make the defendants trespassers: *Parsons v. Lloyd (a)*, *Codrington v. Lloyd (b)*. The reason is, that the issuing of the writ under such circumstances is the act of the parties. But, if the defect rendered the process erroneous only, then the parties would not be liable, for that is the act of the Court: *Phillips v. Biron (c)*, *Parsons v. Lloyd (a)*. There might have been error in the award of execution; for instance, if the writ issued more than a year after the date of the judgment, the replication ought to have excluded this case. There may be error in process; *Com. Dig. Pleader*, (3 B), *Bryan v. Wagstaffe (d)*, *Ransford v. Bosanquet (e)*; but the Court are in the habit of interfering on motion, and will not put the party to a writ of error.

Unthank in support of the replication. The plea shews a regular judgment, which is stated to be in full force, and then a writ founded upon it. It is true that if the judgment had been erroneous the parties would not be liable, but the rule does not apply where the process is erroneous, for the Court is no party to the process, but those who sue it out only. In *King v. Harrison (f)* it appeared on the record that the writ had not been quashed in toto, but only for the excess. There was therefore a valid writ subsisting in that case, but here it is stated that the writ was set aside by a judge's order, and it must be assumed that it was set aside for irregularity; a judge would not set it aside for error. [*Patteson J.* If there was more than a year between the

(a) 3 Wils. 341.

(b) 8 A. & E. 449; S. C. 2 N. & P. 442.

(c) 1 Str. 509.

(d) 5 B. & C. 314.

(e) 12 A. & E. 813; S. C. 3 P. & D. 298.

(f) 15 East, 612.

judgment and the issuing of the writ, that would be error on the record, and yet in practice we set aside such writs.]

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Butt in reply. This is erroneous process only on the face of the replication, and as that is the act of the Court the defendants are not liable. [*Patteson J.* What error is suggested?] If the writ issued more than a year after the judgment, without any scire facias to revive it. [*Patteson J.* How could that be the act of the Court? It looks like the act of the party.] In every writ of execution there is first an award of execution on the judgment roll; the execution is therefore in contemplation of law the act of the Court; and, although when the writ is irregular and therefore void, the party is liable as a trespasser, the Court will not intend that such is the case when it is not expressly stated in the pleadings.

LORD DENMAN C. J.—The plaintiff in his replication states that the writ of *capias ad satisfaciendum* in the plea mentioned, after the issuing thereof and before the commencement of the suit, was ordered to be set aside and was set aside by an order of my brother *Cresswell*. The question is, whether the plaintiff ought not to have gone on to shew the ground upon which that learned judge proceeded to order the writ to be set aside. And it is argued that for aught that appears upon the face of the plaintiff's pleading it might have been set aside on account of some defect, that would make it erroneous, and that the defendants in that case would not be liable; and an error in the award of execution has been suggested, namely, the issuing of the writ more than a year after the date of the judgment. I think this objection to the plaintiff's replication must prevail, and that the plaintiff should have guarded himself against it by stating that the writ was set aside for irregularity.

PATTESON J.—I am of the same opinion. Here is a judgment pleaded and a writ of *capias ad satisfaciendum* founded upon it. The plaintiff undertakes to shew that

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the *capias* was void, having been set aside for irregularity. He does not state that fact specifically on his pleadings, but only that the writ was ordered to be set aside and was set aside by order of a learned judge. Mr. *Unthank* says there is no case where a writ is set aside by a judge's order where the defendant can justify under it. If there can be any such case it is sufficient; for, in order to make the defendants trespassers, the plaintiff must shew on the face of his replication that they were not justified under the process which they have pleaded. Then there is the case of a writ issuing more than a year after the date of the judgment, without any *scire facias* to revive it. In practice we at chambers set aside the writ, when perhaps in strictness only the execution is set aside, but then the writ being clearly erroneous, if the judge is to deal with it at all, he must set it aside. How are we to say that that was not the case here, and, if so, the process being erroneous and not irregular, the defendants are justified in what they have done under it.

WILLIAMS and COLERIDGE Js. concurred.

Judgment for the plaintiff.

Tuesday,
 June 6th.

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Case by the
 plaintiff as
 sheriff against
 the defendant

CASE. The declaration alleged that the plaintiff before the committing of the grievances was sheriff of the county as replevin clerk for taking insufficient sureties to a replevin bond. The declaration alleged that the plaintiff duly appointed the defendant one of his deputies for the purpose of making and granting replevins pursuant to the statute, and that the defendant accepted such appointment, and continued to be and was such deputy from the time of his appointment until and after the cause of action, and that the defendant during all that time acted and was one of the deputies of the said plaintiff.

Plea, that the plaintiff did not depute, appoint *and proclaim* the defendant one of his deputies pursuant to and according to the form of the statute, and that the defendant was not at the said time when &c., such deputy in manner and form.

Held, on special demurrer, 1st, that the defendant must be taken to be appointed under statute 1 & 2 *Phil. & Mary*, c. 12; 2nd, that the plea was bad for duplicity, and also because it traversed matter not alleged in the declaration.

of Derby, and as such sheriff, before the committing of the grievances, to wit, &c., duly appointed the defendant one of his deputies for the purpose of making and granting replevins within the said county, pursuant to the statute in such case made and provided; that the defendant then accepted such appointment accordingly, and continued to be and was such deputy of the said plaintiff as such sheriff as aforesaid, from the time of his said appointment until and after a certain day, to wit, &c.; and that the defendant during all the time aforesaid, acted and was one of the deputies of the said plaintiff for making and granting such replevins. The declaration then alleged that while the plaintiff was such sheriff, and the defendant was such deputy, one *William Wilson* and *George Wilson* distrained divers goods and chattels as a distress for arrears of rent due from one *Coning* to the said *W. Wilson* and *G. Wilson*, and that the said *W. Wilson* and *G. Wilson* detained the goods till the defendant as such deputy as aforesaid, and acting as such, caused them to be replevied and delivered to the said *Coning*. It then stated the levy of the plaint in the county court,—its removal by recordari facias,—the declaration in replevin in the court of Queen's Bench, the avowry for rent in arrear, and the judgment for the avowants in the replevin suit, and then went on to allege, that although it was the duty of the defendant as such deputy as aforesaid, before his making deliverance of the said distress to the said *Coning* as aforesaid, in pursuance of the statute in such case made and provided, to take in the name of the said plaintiff as such sheriff as aforesaid, from the said *Coning*, and two responsible persons as sureties for the said *Coning*, a bond in double the value of the said goods and chattels so distrained as aforesaid, conditioned for the prosecuting the suit of replevin of the said *Coning*, for the taking of the said goods and chattels, with effect and without delay, and for duly returning the goods and chattels so distrained in case a return should be adjudged, and, before taking the said bond and making the said deliverance, to use all due and proper care and caution respecting

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taking the same, and making the said deliverance, and to make all due and proper inquiries as to the responsibility and sufficiency of the said sureties, and not knowingly to take such bond from irresponsible and insufficient persons as such sureties. Nevertheless the said defendant, so being and acting as such deputy as aforesaid, not regarding, &c. did not, nor would before his making deliverance of the said distress to the said *Coning* as aforesaid, take in the name of the plaintiff as such sheriff as aforesaid, from the said *Coning* and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously omitted and neglected so to do. And on the contrary thereof, the defendant, as such deputy as aforesaid, in breach of his said duty, fraudulently, deceitfully, wrongfully, knowingly and unjustly, before the replevyng and delivery of the said goods and chattels as aforesaid, to wit, &c. did take, in the name of the said now plaintiff as such sheriff as aforesaid, of the said *Coning* and two other persons, to wit, *John Carey* and *John Rolling*, a certain bond conditioned for the prosecuting the said suit of the said *Coning* with effect and without delay, and for duly returning the said last mentioned goods and chattels in case a return thereof should be adjudged, as a bond taken in pursuance of the said statute. And the defendant, before taking the said bond, and making the said deliverance of the said goods and chattels, did not nor would use due care and caution respecting taking the same, and making the said deliverance, but, on the contrary thereof, the said defendant, before taking the said bond, and making the said deliverance, refused, neglected and omitted to make due and proper inquiries respecting the sufficiency and responsibility of such sureties, and took the said bond fraudulently, deceitfully and wrongfully, of the said *Coning*, and two other persons as sureties, that is to say, the said *Carey* and *Rolling*, without making due and proper inquiries as to the sufficiency and responsibility of the said *Carey* and *Rolling* or either of them, and the said plaintiff says that the said

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Carey and Rolling, so taken as sureties as aforesaid, by the said defendant as such deputy as aforesaid, at the time of their becoming pledges and sureties in that behalf as aforesaid, were not good, able, sufficient or responsible sureties for prosecuting the said suit of the said *Coning* with effect and without delay, or for duly returning the said goods and chattels so distrained as aforesaid, in case a return thereof should be adjudged, as he the said defendant as such deputy as aforesaid, then and at the time of taking the said bond and making the said deliverance well knew, but the said *Carey and Rolling* at the time of their becoming such sureties as aforesaid, and of the making of the said deliverance, were, and each of them was, wholly insufficient for that purpose, as the said defendant as such deputy as aforesaid, at the time of the taking of the said bond as aforesaid, and making the said deliverance, well knew. And although a return of the said goods and chattels had been adjudged, yet no return had been made, nor rent satisfied. It then went on to state, that by means of the premises, and of the defendant's negligence and misconduct as such deputy as aforesaid, and in and about the taking of insufficient sureties, an action was commenced and prosecuted by the said *W. Wilson* and *G. Wilson* against the plaintiff, for the damages sustained by them by reason of the insufficiency, which was defended in due course by the plaintiff; and, after averring notice to the defendant of the action, and his refusal to satisfy and pay the said *W. Wilson* and *G. Wilson* for the damages so occasioned as aforesaid, or to take any part in the proceedings so instituted by the said *W. Wilson* and *G. Wilson* against the then plaintiff, it stated that such proceedings were thereupon had in the said suit, that the said *W. Wilson* and *G. Wilson*, by judgment of the said Court, recovered against the plaintiff the sum of 289*l.* 3*s.* 6*d.* for damages and costs, which the plaintiff had been obliged to pay to the said *W. Wilson* and *G. Wilson*.

Plea, that the plaintiff did not *depute, appoint and proclaim* the defendant one of his the plaintiff's deputies, for the pur-

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pose of making and granting replevins within the said county of Derby, pursuant to and according to the form of the said statute in such case made and provided, and that he the defendant was not at the said time, when, &c. such deputy of the plaintiff as such sheriff as aforesaid in manner and form, &c.

Special demurrer, on the grounds that the defendant hath taken issue on matter which is not alleged nor necessarily implied in the declaration, for that the plea alleges that the plaintiff did not *appoint, depute and proclaim* the defendant one of his deputies for the purpose of making and granting replevins, whereas there is no such averment stated in the declaration, or necessarily implied therein, as that he was so deputed, appointed and proclaimed. That the plea offers an immaterial issue, viz. that the plaintiff did not *proclaim* the defendant one of his deputies for the purpose of taking replevins,—also that the plea offers two issues, either of which, if found in favour of the defendant, would be an answer to the action, for that the plea denies that the plaintiff deputed, appointed and proclaimed the defendant one of his deputies for the purpose of making and granting replevins, pursuant to and according to the form of the statute, which denial, if true, would of itself be an answer to the whole action, and also that the defendant was at the said time &c., such deputy of the plaintiff as such sheriff, which last mentioned denial, if true, would also of itself be a good answer to the action: likewise that the plea does not deny the material allegation in the declaration, viz. that the defendant long before, and at the time of the committing of the grievance, and long afterwards, acted and was one of the deputies of the said plaintiff, and lastly that it is not alleged in the plea, nor can it be collected therefrom, that the deliverance of the distress in the declaration mentioned was a deliverance of cattle^(a) taken by virtue of such distress.

J. W. Smith, in support of the demurrer. The declara-

(a) See 1 & 2 P. & M. c. 12, s. 3.

tion alleges that the plaintiff duly appointed the defendant one of his deputies for the purpose of making and granting replevins within the county, pursuant to the statute in such case made and provided. The plea asserts that the plaintiff did not depute, appoint and proclaim the defendant, and that he was not deputy at the time when, &c. The first point is, whether proclamation is necessary to clothe the defendant with the character of deputy, because, if it is not, the plea takes issue upon what is not alleged in the declaration, and is bad on that ground. Neither can the plaintiff be compelled to accept an issue in terms which would put him to the proof of an allegation unnecessary to the maintenance of his action. *Goram v. Sweeting*(a), *Moore v. Boulcott*(b), *Stubbs v. Lainson*(c). Where a pleading contains several allegations, some of which are material, and some not, a traverse which puts in issue not only what is, but what is not material, is bad: *Thurman v. Wilde*(d). But proclamation was not necessary to constitute the defendant deputy in this case, for it does not appear by the record that he was a deputy appointed by the statute 1 & 2 P. & M. c. 12. The declaration only says he was appointed deputy pursuant to the statute; this might have been the statute of Marlbridge. At common law the sheriff could not grant replevins except upon a writ issuing out of Chancery and then only in his county court. But it being found inconvenient that the goods should be detained from the owner from county court to county court, the statute of Marlbridge enabled the sheriff upon plaint made to him, without writ, to make replevin out of court, and this he might do by himself or by his bailiffs. 2 Inst. 139; *Bac. Abridg.* Sheriff, H. 4; *Bac. Abridg.* Bailiff, A. The sheriff therefore by the statute of Marlbridge may grant replevins out of court by his deputy; but proclamation is only required under stat. 1 & 2 P. & M. c. 12. If then there is nothing on the record to shew that the defendant

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(a) 2 Wms. Saunds. 204.

(b) 1 Bing. N. C. 323.

(c) 5 Dowl. P. C. 162.

(d) 11 A. & E. 458; S. C. 3 P. & D. 289.

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was appointed deputy under the statute of 1 & 2 P. & M. c. 12, he must be taken to have been appointed under the statute of Marlbridge, and then proclamation is altogether unnecessary. But, assuming that the defendant was deputy under the statute, its provisions with regard to the proclamation of the deputies are only directory, and the omission to proclaim the defendant does not prevent him from being deputy, but only subjects the sheriff to a penalty. The object of the statute was to relieve parties grieved by vexatious distresses, and enable them to obtain a more speedy delivery of their cattle distrained, by providing a certain number of known deputies for the purpose of making replevins. But to hold proclamation essential to the appointment of a deputy would impede the object of the statute, for the sheriff is not to proclaim the deputies till his first county day, and thus, if there be no deputy till after proclamation, there would be no deputy between the appointment of the sheriff, and his first county day. The words of the section also are all in the affirmative: they may therefore be directory when such a construction is in furtherance of the object of the legislature: *Dwaris*, Statutes, 712; *Rex v. Leicester* (a); *Gwynne v. Burnell* (b); judgment of *Parke B.*; *Pearse v. Morrice* (c); judgment of *Taunton J.*; *Rex v. Mayor of Norwich* (d).

But, assuming proclamation to have been necessary in order to constitute the defendant deputy, it does not lie in his mouth, after he has accepted the appointment, and acted under it, to say that he was not duly appointed. Here the declaration states that the defendant then accepted such appointment, and continued to be and was such deputy from the time of his said appointment until, &c. and during all the time aforesaid acted and was one of the deputies of the plaintiff. There is no denial on the record that the defendant acted as deputy, and his acceptance of the office, and acting, is a personal estoppel against his

(a) 7 B. & C. 19; S. C. 9 D. & R. 772.

(b) 2 Bing. N. C. 39.

(c) 2 Ad. & Ell. 96; S. C. 4 N. & M. 48.

(d) 1 B. & Ad. 310.

saying that he was not duly appointed. The words in the declaration "pursuant to the statute in such case made and provided," may be rejected; *Bennet v. Talbois* (a); *Com. Dig. Action on Statute*, (C) and (H), and the defendant having accepted the office and acted as deputy, is liable for gross negligence; *Coggs v. Barnard* (b), *Doorman v. Jenkins* (c), even though his services were gratuitous. [*Coleridge J.* referred to the case of *Griffiths v. Stephens* (d).] In that case the statutes were not referred to; the question turned on the *fact* of appointment, and the point was never raised that, if the replevin clerk had not been proclaimed, he would have been without authority, but here there is an appointment in fact, and so far *Griffiths v. Stephens* (d) is an authority for the plaintiff.

Lastly, the plea is bad for duplicity. It avers that the plaintiff did not depute, appoint and proclaim the defendant, and that the defendant was not deputy at the time when, &c. This traverse tenders several distinct issues. Suppose the plaintiff at the trial can prove an appointment, but not a due proclamation, the jury must find that the defendant was appointed, but not proclaimed; or suppose he had been duly appointed and proclaimed, but had resigned, then they must find the first part of the issue for the plaintiff, and the latter for the defendant. The traverse here is first of the due reception of the office by denying the defendant's appointment and proclamation, and then a distinct traverse of his continuance in the office by virtue of the appointment. In *Faulkner v. Chevell* (e), to a declaration in debt on the statute 22 Car. 2, c. 46, s. 14, charging the defendant that he being deputy clerk of the peace practised at the sessions as an attorney, the defendant pleaded that he was not at the time, when, &c. deputy clerk of the peace, nor did he commit any of the said supposed offences in manner and form, &c., and the plea was held bad for

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(a) Com. 26.

(d) 1 Chitty, 196.

(b) Ld. Raym. 909.

(e) 5 Ad. & Ell. 213; S. C. 6

(c) 2 Ad. & Ell. 256; S. C. 4 N. & M. 704.

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duplicity. So in *Hulme v. Muggleston* (a). In *Rowe v. Ames* (b), the declaration alleged that the defendant seized the goods of one *R. Waring* and remained in possession of the said goods for a long space of time. The defendant pleaded that he did not seize or take in execution any goods of the said *R. Waring*, or remain or continue in possession thereof by virtue of the said writ, and the plea was held double. The principle is that a proposition embracing two different points of place or time shall not be submitted as a single issue: *Smith v. Dixon* (c). *Robinson v. Rayley* (d) is usually cited, but in that case the several facts stated in the plea made up but one single point of defence.

Erle in support of the plea. The plea is grounded on the assumption that the declaration charges the defendant as deputy under the statute of 1 & 2 P. & M. c. 12. By stating that the plaintiff duly appointed the defendant deputy under the statute, and that the defendant accepted such appointment, the declaration in substance states that the defendant was replevin clerk at the time in the declaration. This he could not have been, if he had never been proclaimed; the plea therefore properly denies in the words of the statute that the plaintiff did depute, appoint and proclaim the defendant deputy. It is true the words depute and proclaim, which are inserted in the plea, are not in the declaration, but they are implied in the assertion that the plaintiff duly appointed the defendant according to the statute, and therefore are properly traversed in express terms by the plea: *Meriton v. Briggs* (e), *Chambers v. Jones* (f). It cannot be intended that the defendant was deputy under the statute of Marlbridge, for that statute gave the sheriff no authority to appoint a deputy for that purpose. *Bac. Ab. Replevin* (C). Nor is the passage cited

(a) 3 M. & W. 30.

(d) 1 Bur. 316.

(b) 6 M. & W. 747.

(e) 1 Ld. Raym. 39.

(c) 7 Ad. & Ell. 1; S. C. 1 N.

(f) 11 East, 406.

& P. 1.

from the 2nd Inst. 139, any authority for that position, for the sheriff is to grant replevins *post querimoniam sibi factam*. The argument in *Wilson v. Hobday* (a) bears on the question, and shews that the power of granting replevins out of court is by the statute of Marlbridge confined to the sheriff alone. Besides it appears clearly from the statute 1 & 2 P. & M. c. 12, that the office of replevin clerk was a new office created by that statute, the words of the section being, "for the *more* speedy recovery of cattle." There is therefore no distinct authority for the sheriff appointing a deputy for granting replevins previous to the statute, and there being a known replevin clerk deriving his authority from the statute, the plaintiff must be understood to have intended that officer, and cannot resort to any supposed deputy deriving his authority from some other source. Next the defendant was not duly appointed deputy until he had been proclaimed. The words of the statute are not directory, nor do the authorities cited for the plaintiff apply, for the statute declares what shall be proof of appointment. Till the first county court there is no legal deputy; then the sheriff appoints by proclamation of the officer; before proclamation the sheriff might revoke his appointment; but the deputy derives his legal character from the appointment followed by proclamation. The words of the statute are "which said deputies so appointed and proclaimed shall have authority." Nor is the defendant estopped from this defence. The plaintiff has no right to look to other parts of the record to see whether there is sufficient to support the declaration. If the defendant was never deputy at all, the ground of action fails, because the allegation of negligence depends upon the fact of the defendant being deputy at the time, that is the prominent cause of action. [*Cole-ridge J.* The argument of the plaintiff is that the defendant would be responsible even although a gratuitous agent.] If that be so, the plea leaves a good cause of action unanswered, and the plaintiff may have the advantage of it by

(a) 4 M. & S. 120.

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moving for judgment non obstante veredicto. [*Patteson J.* The statute does not require that the deputy should be appointed for any particular time ; if so, it is consistent with the plea that he may have been appointed and turned off by the plaintiff before the time in the declaration ; perhaps a traverse of the allegation of his continuance would have been sufficient, but you traverse the fact of the defendant's appointment, and his continuance in the office also,—can you do that?] The plea certainly might have only alleged that the defendant was not deputy at the time, but the same proof would have been required in that case, because he could not have been deputy at any time unless he had been duly appointed by proclamation. If the declaration had alleged that the plaintiff duly appointed and proclaimed the defendant, then the plea might clearly have traversed both these allegations, for they are both necessary to constitute the defendant deputy. But the defendant by his present plea has obtained the object of special pleading in thus raising the question of the necessity of proclamation to the validity of the deputation. [*Coleridge J.* May it not be that the defendant may have been appointed, deputed and proclaimed, and yet that he was not deputy at the time of the cause of action?] The words in manner and form tie up the allegation. If this is the traverse of a material fact there could have been no such break, for, although the defendant might discontinue if he had been duly appointed, yet if he had never been duly appointed he could not continue. The plaintiff says, "I appointed you, you continued, and you were deputy." The defendant replies you never appointed me, and I was not deputy. [*Patteson J.* The plea means I never was properly appointed ; but if I was, I discontinued before the time in the declaration. If the defendant only means to say, I was not deputy, because I was not appointed deputy, what is it but repeating the same thing? How can I take as one proposition that a man was appointed on one day, and that he continued over a space of time?] The defendant's proposition is that he

never was deputy by virtue of the appointment. The plaintiff has no right to call in aid the acting to shew that the defendant had confessed the appointment by acting. [*Patteson* J. Are you not driven to an issue in law? The plaintiff says he appointed the defendant. The defendant says he was not deputed, appointed and proclaimed. Either that is traversing something not averred, or else the declaration is defective in not stating it.] Proclamation is involved in the allegation that the defendant was duly appointed, and therefore it is properly traversed in express words by the defendant: *Mereton v. Briggs*(a), *Chambers v. Jones* (b). The defendant could never have been an officer authorised to take replevins unless he had been proclaimed, and then the whole cause of action fails.

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J. W. Smith in reply. The defendant has no right to raise the question of the necessity of proclamation in this manner. He might either have demurred to the declaration, or he might have pleaded that he never was proclaimed, and then the plaintiff must have demurred; or he might have simply traversed the fact that he was deputy at the time. Instead of this, he denies first the deputation, appointment and proclamation, and secondly, that he was deputy at the time. The plaintiff could not safely accept an issue in this form, for, if the judge at the trial should think the proclamation to be unnecessary, the proof of it could not be dispensed with at nisi prius. The plaintiff must still go down to trial prepared to prove the proclamation as well as the appointment of the defendant, for the verdict can only be entered in the terms of the issue, and must be taken on the immaterial as well as the material averments.

Lord DENMAN C. J.—I think this is a bad plea, whether the averment that the plaintiff did not proclaim the defend-

(a) 1 *Ld. Raym.* 39.

(b) 11 *East*, 406.

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ant one of his the plaintiff's deputies for the purpose of making and granting replevins be material or immaterial. If the proclamation of the defendant is something distinct from his appointment, and necessary in addition to it in order to clothe him with the character of deputy, the plea is clearly double. If proclamation is unnecessary to the validity of the defendant's appointment, and the assertion of it in the plea immaterial, the plea is equally bad, for it puts in issue an immaterial fact, and throws upon the plaintiff the proof of it, and also traverses matter which the plaintiff has not alleged in the declaration. It is said that the judge might in that case direct the jury to reject the proclamation as surplusage, and so dispense with the proof of it; but, even if that were so, the plaintiff cannot be called on to speculate upon what opinion the judge may form of the issue at nisi prius, but is I think bound to take down witnesses to prove all the facts involved in the traverse. Then can the defendant by framing his plea in this manner compel the plaintiff to the proof of an immaterial allegation? I think clearly he cannot, and that the plea is bad, whether we assume the assertion that the plaintiff did not proclaim the defendant to be material or not.

PATTESON J.—This is clearly a bad plea. We must assume that this declaration refers to the statute of 1 & 2 *P. & M.* c. 12, and that the defendant is charged as deputy under it; then the statute requires the sheriff to depute, appoint and proclaim his deputies, and the deputies so appointed and proclaimed are to have authority under the statute to act in the sheriff's name. Three things are to be done, deputation, appointment and proclamation. It is clear that proclamation can not precede deputation, nor does proclamation appear to me to be necessarily involved in deputation. Then it does not follow from the allegation that "the plaintiff duly appointed the defendant deputy" that he was proclaimed; but the declaration goes on to assert that the plaintiff accepted such appointment, and

continued to be and *was* deputy. This is a distinct assertion ; and proclamation, if necessary to his character of deputy, is involved in the assertion that the defendant *was* deputy. Then the plea is clearly double, it should only have traversed that the defendant was deputy, for a traverse of the assertion that he was deputy would involve the fact of his proclamation. But the plea denies that the plaintiff deputed, appointed and proclaimed the defendant, and also that he was deputy at the time. I agree that if deputing and appointing had involved proclaiming, proclaiming might have been put in issue by the plea, but that is not so. The plea is therefore bad, because it traverses an assertion not made in the declaration, and it is also bad because it traverses the fact of the defendant's appointment, and his continuance in the office at the time of the cause of action.

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WILLIAMS J.—Mr. *Erle's* argument assumes that proclamation is necessary to the validity of the defendant's appointment as deputy. The assertion therefore in the plea that the plaintiff did not proclaim the defendant is a material allegation. But the plea states another substantive defence, namely, that the defendant was not deputy at the time. There are therefore two distinct matters in issue, and the plea is double.

Judgment for the plaintiff.

FLIGHT v. LEMAN.

Friday,
 June 9th.

CASE. Second count, for that the defendant theretofore, In case for
 &c. contriving and maliciously intending to injure, harass unlawfully in-
 and damnify the plaintiff, &c., unlawfully and maliciously stigating the
 bringing an
 action, it is
 not enough to aver that the defendant " unlawfully did advise, promise, instigate and
 stir up" the then plaintiff to commence and prosecute the action, without also averring
 that it was commenced and prosecuted without reasonable or probable cause.

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did advise, procure, instigate and stir up one *John Thomas* to commence and prosecute an action of trespass on the case, in the Court of Queen's Bench, against the now plaintiff, together with certain other persons, to wit, one *E. G. F.* and one *J. K.*, and in which said last-mentioned action the now plaintiff and the said *E. G. F.* and *J. K.* did appear, plead and defend the same; averment, that by and through such advice, procurement, instigation and stirring up as aforesaid, the said *J. T.* did in fact afterwards, on the 4th day of January, 1838, commence and prosecute the said last-mentioned action; that he declared therein against the now plaintiff and *E. G. F.* and *J. K.* on the 13th February following. The declaration then set out the pleadings in the action, a trial at the Worcester summer assizes, 1838, and that the now plaintiff and his co-defendants were acquitted. Whereby and by reason of the said suit, action and false claim of the said *J. T.* as to the said premises, and of such advice, procurement, instigation and stirring up, as hereinbefore mentioned, the now plaintiff was not only put to great trouble and vexation in and about the defence of the said action, so far as related to the said false claim so made and prosecuted by the said *J. T.*, by the advice, procurement, instigation and stirring up of the now defendant as aforesaid, and whereof the now plaintiff was acquitted as aforesaid, but also was obliged to pay and did in fact pay a large sum of money, to wit, 800*l.*, in and about the defence of the said action, so far as the same related to the said false claim so then made by the said *J. T.* as aforesaid, and the costs thereof and in relation thereto.

Plea to this count: that before the commencement of the action brought by *J. T.*, and at the period of the committing of the grievance in this count also mentioned, the now defendant was and still is an attorney of the Court of Queen's Bench; and that the said *J. T.* consulted and advised with the defendant as such attorney concerning the

bringing of that action; that the defendant as such attorney then advised *J. T.* that the said action would lie, and that he the said *J. T.* would succeed in the action. And the defendant further saith that he, the defendant, did then as such attorney advise the said *J. T.* in manner aforesaid, and thereby did advise, procure, instigate and stir up the said *J. T.* to bring the said action against the now plaintiff, and the said *E. G. F.* and *J. K.*, which said last mentioned advising, procuring, instigating and stirring up of the said *J. T.* by the now defendant, are the same grievances as in the second count mentioned, &c. Verification.

Replication, de injuriâ, &c.

Special demurrer, on the ground that this replication is inadmissible, inasmuch as the plea does not contain matter of excuse, but justifies the advising, &c. as lawful; and for that it attempts to put in issue all the allegations in the plea, whereas it ought to have taken issue on some single averment.

Joinder in demurrer.

Sir *W. Follett* S. G. for the defendant. The declaration itself is bad. The charge contained in this count is not that of upholding an existing suit, but of procuring and advising the bringing of an action. There is no statement that the defendant was not interested in the result of the suit. There is no statement that it was commenced without reasonable or probable cause, nor that the defendant assisted *Thomas* in the prosecution of it. A count for maintenance, that is, for upholding a plaintiff in prosecuting an existing suit, requires no averment of want of probable cause. But a count for advising and instigating an action—which is not maintenance in the proper sense—does require it. This is the principle of the decision in *Pechell v. Watson* (a). In that case the first count contained the same charge as the present, that is, for instigating the commencement of an action, and it

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was held good; but it contained both the averments, that the defendant was not interested in the suit, and that the action was without reasonable and probable cause. The second count was for "upholding and maintaining" an action, and that was holden good, after verdict, although there was no averment of want of reasonable and probable cause, for the reason above specified, viz. that this was a count for the substantive offence, implied in the legal meaning of the word "maintenance," and therefore not needing it. This is in accordance with the the definition of maintenance in the authorities. Maintenance is, "when a man *maintains* a quarrel to the disturbance or hindrance of right:" *Com. Dig. Maintenance*, (A 1); *Co. Lit.* 368 b. The count is also bad for not sufficiently averring the termination of the suit. The Court then called on

*Barstow* contra. According to Lord Coke, 2 Inst. 213, there are two sorts of maintenance: "*manutenentia est duplex*, that is to say, *curialis*, that is, in courts of justice, *pendente placito*, and of this the said description is given; and *ruralis*, that is, to stir up and maintain quarrels, that is, complaints, suits, and parts in the country other than their own, though the same depend not on plea." Consequently the stirring up and instigating an action may be under some circumstances maintenance, as well as the upholding one already commenced. And as to the other objection, viz. the want of averment that the defendant was not interested in the suit, that appears from *Pechell v. Watson* (a) to be unnecessary. The want of sufficiently shewing the termination of the action, if a defect, can only be taken advantage of on special demurrer.

Lord DENMAN C. J.—The decision of the Court of Exchequer in *Pechell v. Watson* (a) seems to me to rest on the ground that unlawful maintenance of an action

(a) 8 M. & W. 691.

already commenced is in itself an offence, without farther averment. But the charge here is not of unlawful maintenance, but unlawful instigation. The declaration must therefore shew the ingredients which make it unlawful. One of these is want of reasonable and probable cause for the action, and that is omitted here; the declaration is therefore bad.

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PATTESON J.—This count must be governed by the same principle which regulates actions for malicious arrests, prosecutions, and so forth, in all which want of reasonable and probable cause must be averred.

WILLIAMS J.—If the argument relied on for the plaintiff is correct, then, if carried to its legitimate results, the mere instigation to bring an action must amount to the offence of maintenance; for instance, simply informing a party that he has a good cause of action in the opinion of the speaker.

COLBRIDGE J.—I look upon it that “maintenance” is a word with a peculiar legal meaning, implying want of reasonable and probable cause for maintaining the action brought by another. That word is wanting here, and there is no such intendment to be made with respect to the more general words which supply its place; the general analogy therefore applies.

Judgment for the defendant.





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Thursday,  
June 8th.

Case by the plaintiffs as sheriff of Middlesex, against the defendants as attornies of one *David Power*, for falsely representing to the plaintiffs that one *John Wright*, who was then in their custody as sheriff, and entitled to his discharge, was another *John Wright*, against whom the defendants, as attornies for the said *David Power*, had sued out a writ of ca.sa., and delivered the same to the plaintiffs, by reason whereof the plaintiffs wrongfully detained the firstmentioned *John Wright*,

and were afterwards obliged to pay him 10*l.*, and the costs of an action commenced against them by him for the unlawful detainer. The declaration, after stating the delivery of the writ to the plaintiffs, and that the *John Wright* then in their custody was not the same person as the *John Wright* mentioned in the writ, and that he was entitled to his discharge, went on to aver that the defendants, well knowing the premises, and for the purpose of preventing the plaintiffs from discharging the said *John Wright*, made the false representation. The defendants pleaded not guilty; and, amongst other pleas, 3rdly, that they had reasonable and probable cause to believe, and did believe, the representation to be true, which last issue was found for them on the trial. *Held*, that the plaintiffs were entitled to judgment non obstante veredicto on the third plea. Secondly, that the allegation in the declaration that the defendants knew their representation to be false was immaterial, and that the verdict on the plea of not guilty was properly entered for the plaintiffs, notwithstanding the finding of the jury on the third plea.

It was proved at the trial that the 10*l.* was not the monies of the plaintiffs, but of their officer, and paid by him to compromise the action brought against the sheriff:—*Held*, that the plaintiffs were entitled as trustees for the officer to recover the full amount of the monies so paid. (*Reversed on error in the Exchequer Chamber, Hil. Vac. 1844.*)

EVANS and WHEELTON, Esqs. v. COLLINS and RIGLEY.

### CASE for false representation.

The declaration stated that the defendants, as the attornies for one *David Power*, caused to be issued out of the Court of Common Pleas a writ of testatum capias ad satisfaciendum against one *John Wright*, at the suit of the said *David Power*, directed to the sheriff of Middlesex, whereby he was commanded to take the said *John Wright*; and, (after stating the indorsement of the writ, and the delivery thereof by the defendants, as attornies of and for the said *David Power*, to the plaintiffs, who then and from thence until and at the time of the committing of the grievance were sheriff of Middlesex, by them as such sheriff, in due course of law to be executed,) went on to allege that afterwards the plaintiffs, so being such sheriff, lawfully had and detained in their custody, as such sheriff, in a certain prison of them the said plaintiffs, as such sheriff, a certain other *John Wright*, not being the same person as the *John Wright* against whom the said writ of testatum capias ad satisfaciendum at the suit of the said *David Power* had been and was so issued by the defendants, as the attornies of the said *David Power* as aforesaid, that is to say, under and by virtue of a certain other writ of testatum capias ad

satisfaciendum, issued out of her Majesty's Court of Queen's Bench at Westminster, at the suit of one *Benjamin Moseden*, and directed to the said sheriff of Middlesex, and that afterwards, and after the delivery to the said plaintiffs as such sheriff as aforesaid, of the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, while the plaintiffs were and continued such sheriff of Middlesex as aforesaid, and while the said *John Wright*, thereinbefore mentioned to have been lawfully detained in the custody of the plaintiffs as such sheriff, was and continued lawfully in such custody, to wit, &c. the said last mentioned *John Wright* became and was entitled to his discharge from such custody, and it then became and was the duty of the plaintiffs, as such sheriff, to discharge, and the said plaintiffs as such sheriff, but for the committing of the said grievance by the defendants as thereafter mentioned, would have discharged, and the said plaintiffs were about to discharge, the said last mentioned *John Wright* from their custody as such sheriff, yet the said defendants, so being such attornies of the said *David Power* as aforesaid, and *well knowing the premises*, after the delivery, &c. while, &c. and after the said last-mentioned *John Wright* had so become and was entitled to be discharged, and was about to be discharged, by the said plaintiffs out of the custody of them the said plaintiffs as such sheriff as aforesaid, to wit, &c., the said defendants so being such attornies for the said *David Power* as aforesaid, *for the purpose of preventing the said plaintiffs as such sheriff from discharging* the said last mentioned *John Wright* from their custody as such sheriff, which the said plaintiffs were then about to do, and would otherwise have done, *falsely* represented and declared to the plaintiffs, so being such sheriff as aforesaid, that the said last mentioned *John Wright*, then being in the lawful custody of the plaintiffs as such sheriff as aforesaid, and whom the said plaintiffs were then about to discharge from their said custody, was the same person as the other *John Wright* thereinbefore

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mentioned, against whom the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, had been and was so issued by the said defendants as the attorneys of and for the said *David Power* as aforesaid, *whereas in truth* and in fact the said *John Wright*, whom the said plaintiffs were so then about to discharge from their custody as aforesaid, was not the same person as the said *John Wright* against whom the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, had been and was so issued by the defendants as aforesaid, but was another and different person, and the said defendants, by so falsely representing and declaring the said person to be the same *for the purpose of preventing the discharge* from custody of the said *John Wright*, so being, &c., did then and there, to wit, &c. and from thence for a long space of time after the said *John Wright* had so become and was entitled to his discharge as aforesaid, to wit, &c. during all which time the plaintiffs were and continued sheriff of Middlesex as aforesaid, cause the plaintiffs as such sheriff to keep and detain the said last mentioned *John Wright* in their custody as such sheriff, under the supposed authority of the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, and the said plaintiffs being during all that time ignorant and without any notice whatsoever from the said defendants or otherwise, that the said *John Wright* so being in their custody, and the said *John Wright* against whom the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, had been and was so issued as aforesaid, were not the same person, and on the contrary thereof, confiding in the said false representation and declaration of the defendants that they were the same person, and believing the same to be true, did by reason and means of the said false representation and declaration of the defendants keep and detain the said last mentioned *John Wright* in their custody as such sheriff, to wit, in the prison aforesaid, under the supposed authority of the said writ of testatum

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capias ad satisfaciendum, at the suit of the said *David Power*, as and for the same *John Wright* in the said writ last aforesaid mentioned, for a long space of time after the said *John Wright*, so being in the custody of the said plaintiffs as aforesaid, had so become entitled to be discharged, and ought to have been discharged from the said custody, to wit, for the said space of two days then next following and until the 18th day of June, A.D. 1840, on which said last mentioned day, and not before, the said plaintiffs discovered and ascertained that the said representation and declaration of the said defendants was false, and that the said *John Wright*, so being in their custody as aforesaid, and the said *John Wright*, against whom the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, had been and was so issued as aforesaid, were not the same person, and the said plaintiffs did thereupon, then, to wit, on the day and year last aforesaid, forthwith discharge the said *John Wright*, whom they had so detained as aforesaid, from their said custody, by reason and means of which said premises afterwards, and after the discharge of the said last mentioned *John Wright*, and before the commencement of this suit, to wit, on the day and year last aforesaid, the said last mentioned *John Wright* commenced and prosecuted an action in her Majesty's Court of Common Pleas at Westminster against the said plaintiffs for and in respect of the said illegal detainer and imprisonment of him the said *John Wright* as aforesaid, occasioned as aforesaid, and such proceedings were thereupon had in the said action, that afterwards, to wit, on the day and year last aforesaid, the plaintiffs, in order to settle the said action, and prevent any further proceedings against them in the same, were forced and obliged to pay, and did necessarily and properly, and with the consent of the said defendants pay, to the said last mentioned *John Wright* a large sum of money, to wit, 10*l.*, as and for damages and compensation, being a reasonable sum in that behalf, for the illegal detainer and imprison-

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ment of the said *John Wright* as aforesaid, occasioned as aforesaid, and for which the said last mentioned action was so commenced and prosecuted as aforesaid, and also the further sum, to wit, of 3*l.* 3*s.*, as and for the said *John Wright's* costs of the said action, and also they the said plaintiffs, by means of the said premises, were forced and obliged to sustain and incur, and have sustained and incurred, divers costs, charges and expenses, amounting in the whole to the further sum of 20*l.*, in and about the defence of the said last mentioned action, and in and about the settling and putting an end to the same as aforesaid. And the plaintiffs, by means of the said premises, have been and are otherwise greatly injured and damnified, to the damage of the said plaintiffs of 150*l.*, and thereupon they bring suit, &c.

Pleas: First, not guilty.

Secondly, that the defendants did not cause the plaintiffs to keep or detain *John Wright* in the declaration mentioned in their custody under the supposed authority of the said writ of testatum capias ad satisfaciendum, at the suit of the said *David Power*, and the plaintiffs did not by reason and means of the said representation and declaration of the defendants keep or detain the same *John Wright* in their custody under the supposed authority of the same writ for any part of the time in the declaration in that behalf mentioned. And the plaintiffs were not forced or obliged to, nor did necessarily or properly, or with the consent of the defendants or either of them, pay to the same *John Wright* the sums of money in the declaration in that behalf mentioned, or either of them, or any part thereof, nor were the plaintiffs forced or obliged to sustain or incur, nor have they sustained or incurred the costs, charges and expenses in the declaration mentioned, or any or either of them, or any part thereof, in manner and form as in the declaration alleged.

Thirdly, that at the time they made the representation and declaration in the plaintiffs' declaration mentioned, they the defendants had good and probable reason to believe, and

then did with good faith believe, that the said representation and declaration was true, and that the said *John Wright*, then in the custody of the plaintiffs, as such sheriff, was the same person as the other *John Wright* against whom the said writ of testatum capias ad satisfaciendum at the suit of the said *David Power* had been and was issued, and this the defendants are ready to verify, &c.

Fourthly, that just before the time of committing the supposed grievance in the declaration mentioned, to wit, on the same day and year in the declaration in that behalf mentioned, the plaintiffs inquired of the defendants if the said *John Wright*, in the custody of the plaintiffs, was the same person as *John Wright* against whom the said writ at the suit of the said *David Power* had been issued, and the plaintiffs then informed the defendants of the residence of the said *John Wright* then in their custody, before and at the time he was taken, and then described to the defendants the same *John Wright*, and such information and description then corresponded with the supposed residence and the description of the said *John Wright* against whom the said writ at the suit of the said *David Power* had been issued, and then induced the defendants to believe that it was probable that the said *John Wright* was the *John Wright* against whom the said writ had issued at the suit of the said *David Power*, and the defendants then informed the plaintiffs that they considered it probable that the said *John Wright*, in the custody of the plaintiffs, was the *John Wright* against whom the last mentioned writ had been issued, and then declined to speak with certainty as to the identity of the two *John Wrights*, and the plaintiffs then requested the defendants to state that the said *John Wright* in the custody of the plaintiffs was the *John Wright* against whom the said writ had issued at the suit of the said *David Power*, and thereupon the defendants, at the request of the plaintiffs, at the said time when, &c. with good faith represented and declared to the plaintiffs as in the declaration mentioned, the defendants not then knowing that the

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said *John Wright* in the custody of the plaintiffs was not the *John Wright* against whom the said writ had issued at the suit of the said *David Power*, which is the same supposed grievance in the declaration mentioned, and whereof the plaintiffs have above complained against the defendants, and this the defendants are ready to verify, &c.

Replications: To the first and second pleas similiter. To the third, *de injuriâ*; and to the fourth, that they the said plaintiffs did not request the said defendants to state that the said *John Wright* in the custody of the plaintiffs was the *John Wright* against whom the said writ had issued at the suit of the said *David Power*, and the defendants did not commit the said grievance in the said declaration mentioned, at the request of the said plaintiffs, in manner and form, &c. Issue thereon.

At the trial before *Wightman J.*, at the sittings after Hilary Term, 1842, it appeared that the plaintiffs, as sheriff of Middlesex, had arrested a person of the name of *John Wright*, at the suit of one *Benjamin Moseden*, and had him in custody in Whitecross Street prison, and that the defendants, who were attornies, had sued out a *capias ad satisfaciendum* at the suit of one *Power* against another *John Wright*, and delivered it to *Sloman*, as the officer of the plaintiffs, to be executed. The first *John Wright* having become entitled to be discharged, *Sloman* sent his description to the defendants, accompanied by a note in the following words:—" *John Wright* ats *Power*. You are requested to certify whether the person arrested is the same person;" to which the defendants' clerk returned the following answer, indorsed on the note, " within-named defendant is the same person against whom we have lodged a detainer," which was signed by the defendants' clerk. Upon this the plaintiffs detained the first mentioned *John Wright*, after he was entitled to his discharge, till the mistake was discovered, when he was liberated. For this wrongful detainer *Wright* brought an action against the sheriff, the present plaintiffs. As they had no defence,

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*Sloman* paid 10*l.* to settle the action, but before doing so, wrote to the defendants to know whether they would consent to that arrangement, to which they returned the following answer:—" *Wright v. Sheriff of Middlesex*. Without admitting our responsibility, we agree to any mode of settlement the sheriff may think proper," signed *Collins* and *Rigley*. Upon this evidence the learned judge asked the jury, first, whether the defendants' clerk had a general authority to bind them, by stating that the *John Wright* whom the plaintiffs had in their custody was the *John Wright* against whom the *capias* at the suit of *Power* had been issued; secondly, whether he had probable cause to believe that statement to be true; and thirdly, whether he was induced to make the statement in consequence of any representation by *Sloman* that the *John Wright* in custody was the person against whom the *capias* at the suit of *Power* had been issued. The jury answered the first two of these questions in the affirmative, and the third in the negative; whereupon a verdict was entered for the plaintiffs on all the issues but the third, with 1*s.* damages, and leave was given to the defendants to move to enter a nonsuit, and to the plaintiffs to increase the damages to 10*l.*

Rules were subsequently obtained by *Erle* for the plaintiffs for judgment non obstante veredicto on the third plea, and to increase the damages to 10*l.*; and by *Platt* for the defendant for a nonsuit; also for a new trial, as against evidence, and in arrest of judgment, all of which now came on for argument together.

*Erle* for the plaintiffs. Assuming the money paid to settle the action brought by *Wright* against the sheriff to have been the monies of *Sloman* and not of the sheriff, the action is still properly brought in the name of the plaintiffs as sheriff of Middlesex, and they are entitled to recover the sum of 10*l.* by way of damages as trustees for *Sloman*. The plaintiffs, as sheriff, were in the first instance responsible. *Wright* had brought his action against them for the



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wrongful detainer, and was entitled to damages for the injury he had sustained, though primarily occasioned by the false representation of the defendants. That action was clearly maintainable. The defendants gave their consent to the compromise of it; and upon that footing the 10*l.* was paid by *Sloman*. *Sloman* as officer was bound to indemnify the sheriff, and therefore pays the money in the first instance. He may therefore sue in the sheriff's name, and the plaintiffs are in the present case trustees for *Sloman*. *Lamb v. Vice (a)* is in point. That was an action in the name of the Knight Marshal of the Palace Court against the defendant, who was an officer of the court, upon a bond conditioned to take sufficient bail from all defendants arrested, and to obey the order of the court. The defendant having taken insufficient bail from a defendant arrested in an action in that court, and having disobeyed an order of the court requiring him to pay the amount of the debt and costs in the action, it was held that the knight marshal was entitled as trustee for the plaintiff in the action to recover, in an action on the bond, the full amount of the debt and costs. The actions which arise out of the loss of ships are analogous; when the ship has been run down at sea, the insurers are liable on the loss, but an action is maintainable in the name of the owner against the wrongdoer, for the benefit of the insurer. So after an abandonment the insurers are entitled to the wreck, but they must sue in respect of it in the name of the owners. The damages in *Wright v. Evans* would have been levied on the present plaintiffs, but would have been paid in fact by *Sloman*; but *Sloman* could not sue for the false representation, although the plaintiffs could. Secondly, the plaintiffs are entitled to judgment non obstante veredicto on the third plea. The jury have found upon the issue there raised that the defendants had reasonable and probable cause to believe, and did believe, the truth of the represen-

(a) 6 M. & W. 467.

tation they made with respect to the identity of the *John Wright* then in the plaintiff's custody at the suit of *Mosedon*, with the *John Wright* against whom they had issued a *capias ad satisfaciendum*. But this is wholly immaterial to the plaintiff's right of action: it was their duty as sheriff to detain the prisoner, or let him go at their peril. The defendants might have refused to give any answer to the question put to them, and have called upon the plaintiffs to act on their own responsibility. Instead of this, they represent the party in custody as the person against whom they have the writ, and call upon the sheriff to act upon their information. Their belief in the truth of their statement does not render it less false in fact, nor free them from the consequences of its falsehood. In *Polhill v. Walter* (a) there was a direct assertion of authority which the defendant did not in fact possess, but he *bonâ fide* believed that his act would be sanctioned by his principal. [*Patteson J.* There he asserted what he *knew* to be false at the time. Lord *Tenterden C. J.* says expressly, "if the defendant had had good reason to believe his representation to be true, he would have incurred no liability, for he would have made no statement which he *knew* to be false."] In the present case there is the unqualified assertion of a positive fact by a party having the means of knowledge, and which turns out to be false. *Humphreys v. Pratt* (a) is in favour of the plaintiffs. That was an action by the sheriff against the defendant for deceit, in representing that certain goods, which the sheriff was directed to seize under a *fi. fa.* at the suit of the defendant, were the property of the party against whom the *fi. fa.* was directed, whereas in fact they were the goods of another person. There was no allegation in the declaration that the representation was made fraudulently, or that the defendant knew it to be untrue; and the House of Lords confirming the decision of the Court of Exchequer and of Exchequer Chamber in

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(a) 3 B. &amp; Ad. 114.

(b) 2 Dow &amp; C. 288.

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Ireland, held the count good. The principle there laid down is, that he who affirms either that which he does not know to be true, or that which he knows to be false, to another's prejudice and his own gain, is a wrong doer and must answer in damages for the injury occasioned by his falsehood. The facts in the present case are precisely the same with those in *Humphreys v. Pratt* (a), with the exception that there the writ was a *fi. fa.*, here a *ca. sa.* In both the injury is the assertion by the defendant of a fact which he does not at the time know to be true, upon which the plaintiff is induced to act, and which afterwards turns out to be false. This is sufficient to support the action. In the late case of *Smout v. Ilbery* (b), *Alderson B.* in delivering the judgment of the Court, and speaking of the case where a party making a contract as agent *bonâ fide* believes he has authority when in fact he has none, says, "it is a wrong, differing only in degree, but not in essence, from the former case, (that of an agent who has no authority and knows it, but nevertheless makes the contract as having such authority), to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes without sufficient ground that the statement will ultimately turn out to be correct."

*Platt and Peacock* contra. The effect of the finding of the jury on the third plea is to entitle the defendant to the verdict on the general issue, inasmuch as it shews that the plaintiffs have failed in proving the charge contained in their declaration. The declaration alleges that the plaintiffs had in custody a certain other *John Wright*, whom they would have discharged but for the representation made by the defendants, but the defendants well knowing the premises, that is, that the plaintiffs had the wrong *John Wright* in custody, for the purpose of preventing the plaintiffs from discharging him, falsely represented, &c. The

(a) 2 Dow & C. 288.

(b) 10 M. & W. 1.

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declaration therefore charges that the plaintiffs, at the time they made the statement, well knew that it was false, but the jury have found that at the time they made it they had probable cause to believe and did believe it true. But the fact that the defendants made the declaration, and that they knew it to be false at the time, are both put in issue by not guilty, for they both together make up the injury of which the plaintiffs complain in this declaration. In actions on the case the plea of not guilty under the new rules operates as a denial only of the wrongful act alleged to have been committed by the defendant. The instances there given in slander and nuisance shew the effect of the rule. In an action for malicious indictment or arrest, it puts in issue the malice and want of probable cause; *Cotton v. Browne* (a); and in an action for keeping a mischievous animal, it denies the scienter as well as the fact that the animal is dangerous: *Thomas v. Morgan* (b). Here it denies the wrongful act as alleged in the declaration, that is, that the defendants, knowing the premises, made a false representation, with intent to prevent the plaintiffs from discharging their prisoner. The case of *Humphreys v. Pratt* (c) does not apply. In that case there was no allegation in the declaration that the defendant knew the statement to be untrue, and the count expressly stated that the defendant *required* the plaintiff to seize the goods under the execution, and that the defendant accordingly seized *at the request and by the directions and at the requisition of the defendant*. There the request amounted to a warranty, like the case of an auctioneer asked to sell goods by a person to whom they do not belong. But in the present case there was no application on the part of the defendants; on the contrary, the inquiry was made by the plaintiffs, and the defendants' clerk, in consequence of their request, wrote on the back of *Sloman's* note, "The defendant is the same person against

(a) 3 A. & E. 312; S. C.  
 4 M. & N. 531.

(b) 2 C. M. & R. 496.  
 (c) 2 Dow & C. 288.

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whom we have lodged a ca. sa.;" but the defendants were not bound to give that information, and the clerk could not be understood as guaranteeing the truth of it. To maintain the action there must be fraud on the part of the person making the assertion, or the knowledge that his statement is false: *Foster v. Charles(a)*. Fraud without damage or damage without fraud gives no cause of action, but where they concur an action lies: *Pasley v. Freeman(b)*, *Tap v. Lee(c)*. And it is from the fact of the statement being false within the defendant's knowledge, that the Court infers fraud: *Corbett v. Brown(d)*, *Moen v. Heyworth(e)*. Here the plaintiffs have expressly averred fraud, and the knowledge by the defendants of the falsehood of their statement, and the finding of the jury on the third plea, negatives the scienter; the defendants are therefore entitled to the verdict on the plea of not guilty. But the plaintiffs here have not sustained any damage. The money paid by *Sloman* to settle the action was his own, and not that of the plaintiffs, they have therefore not themselves sustained any damage from the wrongful act of the defendants. Neither can they sue as trustees for *Sloman*. *Lamb v. Vice(f)* does not apply; the bond given by the defendant to the knight marshal in that case was for the performance of all the duties of the office, and intended to be for the benefit of all parties damnified by the defendant's breach of duty. The knight marshal was therefore trustee for all parties damnified by the defendant's acts, but here the damage of the officer is not the damage of the sheriff, so as to entitle him to bring the action. But if there is no damage the action cannot be maintained: *Wylie v. Birch(g)*. The defendants are therefore entitled to a nonsuit.

*Cur. adv. vult.*

- (a) 6 Bing. 396, and 7 Bing.  
 108.  
 (b) 3 T. R. 51.  
 (c) 3 B. & P. 367.

- (d) 8 Bing. 33.  
 (e) 10 M. & W. 147.  
 (f) 6 M. & W. 473.  
 (g) 12 Law J. (N. S.) Q. B. 260.

Lord DENMAN C. J., in Trinity Vacation (June 24), delivered the judgment of the Court as follows:—The plaintiffs were late sheriffs of London, and brought this action against two persons, attornies for one *Power*, who had sued *John Wright* for a debt, and obtained execution against him, for falsely representing another *John Wright* (who was then in custody of the plaintiffs) to be the defendant in the action, *though they knew the contrary*; by which false representation plaintiffs were induced to detain the wrong person, who thereupon brought an action against them, and therein recovered (by way of compromise) 10*l.* in respect of the unlawful imprisonment.

To this declaration not guilty was pleaded, and (among other pleas not now requiring observation) that defendants had reasonable and probable cause to believe the person whom they pointed out to be the real defendant.

On the trial at Guildhall, before my brother *Wightman*, plaintiff obtained a verdict on all the pleas but the third with 1*s.* damages. The jury found for the defendants on the third, with leave to move for a nonsuit, if the Court should think fit, on a consideration of the evidence, and with leave for plaintiffs to move for an increase of the damages to 10*l.*, if entitled thereto.

Defendants obtained a rule for a nonsuit, also for a new trial, for a verdict against evidence, and, if they should fail in both, then in arrest of judgment, for the insufficiency of the declaration; and plaintiffs their cross rule, and also for judgment non obstante veredicto on the third plea. Both were argued at great length.

The following facts appeared on the learned judge's notes: Plaintiffs having the writ against *John Wright*, banded it to their officer *Sloman*, who hearing of a person of that name being under arrest, described him by a letter to the managing clerk in that action for defendants, and inquired if that was *John Wright*. The clerk took the letter into the office where defendants were, and after some little time returned and told him that was *John Wright*.

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Thereupon *Sloman* kept him in prison. He brought his action against the sheriff, who called on *Sloman*, and *Sloman* compromised the action with him for 10*l.*, which he paid with his own money.

We think, in opposition to defendants' argument, that here was clear evidence for the jury, that the clerk made the representation with the authority of his principals, and that they were justified in finding that fact. We think too that the action was maintainable by the sheriff, though the act was that of their officer, and not of themselves, and the money paid by way of compromise was his, not theirs, they being primarily liable for his unlawful arrest, and competent to sue for his benefit, if the unlawful act was produced by defendants' misconduct. The agency of *Sloman* for plaintiffs, so as to entitle them to sue, and that of the clerk for his employers, so as to fix them with false representation, were both well proved.

It was not contended by the learned counsel for defendants that the third plea found for them could be sustained, but he claimed the verdict on the first plea or nonsuit for want of proof that defendants knew their representation to be false, such knowledge being averred, as he said, in the declaration; plaintiffs on the other hand maintaining that, if the representation be false and injurious, defendants' knowledge of its falsehood is immaterial, even if it be averred, which they denied.

Many authorities were adduced on both sides, none directly in point; *Corbett v. Brown* (a) bears a strong resemblance to the present case, and was in a great measure the foundation of *Humphreys v. Pratt* (b) in the House of Lords, in which a sheriff brought his action against the execution creditor for falsely representing to him that plaintiff's goods were the debtor's property, whereby he was induced to seize them, and afterwards compelled to pay damages for the seizure. Plaintiff recovered in the Irish Court of King's Bench,—a judgment affirmed in the House of Lords. The only difference in the facts is, that in that

(a) 8 Bing. 33.

(b) 2 Dow & C. 288.

case goods were seized; in this, the debtor himself was arrested. But there the declaration contained no averment of knowledge; here knowledge was averred and disproved.

Upon consideration, we hold that the principle of *Humphreys v. Pratt* (a) must be applied to the present case; one of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame, but the party who caused his loss, though charged neither with fraud nor negligence, must have been guilty of some fault, when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true, and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct.

The allegation that defendant knew his representation to be false is therefore immaterial. Without it, the declaration discloses enough to maintain the action, and nothing that goes beyond that necessity need be proved.

It follows from this and what we before observed, that defendants' rule must be discharged, and that plaintiffs must have their rule absolute for judgment non obstante veredicto on the third issue to increase the damages to the sum bonâ fide paid by *Sloman* to the person improperly arrested under defendants' information.

Rules accordingly.

(s) 2 Dow & C. 288.

KEPPEL v. SHILSON and another.

Monday,  
June 12th.

**ASSUMPSIT** to recover a fee of 4s. 4d., payable by defendants to plaintiff, as registrar of the diocese of Exeter.

settling an action of assumpsit and staying proceedings, &c. on payment of 4s. 4d. into Court. The Master taxed costs on the higher scale. A judge having ordered that the Master should review his taxation and tax on the lower scale, according to rule H. T. 4 Will. 4, the sum being under 20*l.*, the Court refused to rescind such order, on a suggestion that the cause was one which it would have been proper to try before a judge, the action being brought to try a right.

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A judge's order had been obtained by consent, for



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The particulars of demand described it as a fee payable at the visitation of the bishop, and due from the defendants in their character of churchwardens of a parish in the diocese. An order had been made by a judge of this Court by consent, that on payment of 4s. 4d. for the debt, and costs to be taxed and paid, all further proceedings in the cause should be stayed (25th January, this year). The Master taxed the costs on the higher scale. On February 4th, the defendants obtained an order from *Coleridge J.*, directing the Master to review this taxation, and tax on the lower scale, pursuant to the rule Hil. T. 4 *Will. 4*, that in all actions of assumpsit, debt or covenant, where the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, should not exceed 20*l.* without costs, the plaintiff's costs should be taxed on the reduced scale: "provided that *in case of trial before a judge of the superior Courts, or judge of assize*, if the judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale."

*Montague Smith* now moved to rescind this order, on affidavits setting forth that the cause was one which would have been proper to be tried before a judge, and contended for a liberal application of the proviso at the end of the rule, so as to comprehend not only cases where the trial actually takes place, but those also which are settled out of Court, and which are specially mentioned in the first part of the rule.

Per CURIAM (a)—

Rule refused.

(a) Lord Denman C. J., Patteson, Williams and Coleridge Js.



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## The QUEEN v. MEYER ALBERT.

**MISDEMEANOUR.** The indictment found at the Central Criminal Court stated that the defendant, "late of the parish of St. Stephen's, Coleman Street, in the city of London, and within the jurisdiction of the said Court, &c. with force and arms, at the parish aforesaid, and within the jurisdiction of the Court aforesaid," committed the act of public indecency charged against him. This indictment was found at the June sessions, 1841, and afterwards removed by the defendant, by certiorari, into this Court. The trial was at the London sittings after Michaelmas Term, 1841. Verdict, guilty.

In the following term a rule nisi was obtained in arrest of judgment, on the same ground with that granted in *Reg. v. Stowell* (a), viz. that the statement of venue "within the jurisdiction of the said Court," which is rendered sufficient by the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 3, in the case of indictments tried in that Court, was inapplicable where the indictment was removed by certiorari, and that, if that venue were held insufficient, then enough did not appear on the face of the indictment to give a jury for the city of London jurisdiction; and *Rex v. Burridge* (b) was cited.

Where in an indictment, after describing the defendant as "of the parish of A. in the county of B.," the offence is laid to have been committed "at the parish aforesaid," omitting any statement of county, this statement of the venue, if defective, is cured by 7 Geo. 4, c. 60, s. 24, after verdict, the case having been tried by a jury of the county first named.

*Quere*, whether the statement be defective.

*R. Gurney* now shewed cause. Supposing the objection urged to the indictment in *Reg. v. Stowell* (c) to prevail, there is still enough on the face of this indictment to shew that the offence was committed in London. The averment is, that the defendant, of the parish of St. Stephen's, Coleman Street, in the city of London, committed the offence "at the parish aforesaid." No parish but St. Stephen's, Coleman Street, has been mentioned, and that parish has

(a) See *post* Trin. Vac.

(b) 3 P. Wms. 496.

(c) That case was at this time pending for judgment.

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been averred to be in the city of London. The statement of the place where the offence was committed is therefore complete, although made so only by words of reference. It will be contended that the Court cannot take notice that all the parish of St. Stephen's, Coleman Street, is in the city of London; as the Court held, in *Rex v. Burridge* (a), that an averment that a prisoner was committed to the custody of the keeper of the gaol at Ilchester, in the county of Somerset, and that afterwards the defendant, "at Ilchester aforesaid," aided him to escape, was insufficient, because it "would not take notice that the whole township or vill of Ilchester is in the county of Somerset." But in *Rex v. Joseph Perkins* (b), Mr. Justice Park held, that an offence was well laid to have been committed in the parish of Hales Owen, in the county of Worcester, although it appeared that in point of fact part of that parish was in another county. At all events, this is a case of an imperfect statement of venue, cured after verdict by the express provision of 7 Geo. 4, c. 64, s. 20.

*M. Chambers* contra. That statute only cures defects, where it sufficiently appears from the indictment that the jury which tries the offence has jurisdiction over it. But, if the objection taken here on the authority of *Rex v. Burridge* (a) be good, then it does not appear that a London jury had such jurisdiction, for *non constat* that the whole parish of St. Stephen's, Coleman Street, is in London; and the statute does not apply. [Lord Denman C. J. referred to the act 22 Car. 2, c. 11, intituled "An additional Act for the Rebuilding of the City of London," in which the names of the parishes of London are given, St. Stephen's, Coleman Street, among the number; see sect. 63; and which is a public act.] That will only enable the Court to take notice that there is a parish of that name in London, not that there is no parish of the name elsewhere.

(a) 3 P. Wms. 496.

(b) 4 C. &amp; P. 363.

LORD DENMAN C. J.—I think this case distinguishable from *Reg. v. Stowell*(a), and that the point which we have reserved for judgment on that case does not arise. We have here a statement that the offender is of a certain parish in the city of London, and that the offence was committed “at the parish aforesaid.” It is urged that, for all that appears, part of the parish, and that part in which the offence was committed, was without the city of London. But I think the words “within the parish aforesaid” must in common reason be taken to imply within the county aforesaid also. This construction appeared to me to be fortified, in the case before us, by the act of *Charles* the Second, to which I alluded; it appears by that act that there is a parish of St. Stephen’s, Coleman Street, wholly within the city, and it does not appear that there is any parish of that name partly within the city. But at all events I think that if this statement of place were defective, it would be an instance of “want of proper and perfect venue,” within 7 *Geo.* 4, c. 64, s. 20.

PATTESON J.—*Rex v. Burridge*(b) certainly raises a difficulty, where without that authority I should have found it difficult to see any. But, even if the objection would have been good before the statute of 7 *Geo.* 4, I think it is clearly cured by it.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

(a) See *post* Trin. Vac.

(b) 3 P. Wms. 496.



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Thursday,  
June 15th.

The Guardians of the Poor of the BANBURY UNION  
v. ROBINSON.

Assumpsit on an agreement for the purchase of certain real property stated in the declaration to have been put up for sale in pursuance of an order under the hands and seals of the Poor Law Commissioners. The declaration set out the conditions of sale, one of which was, that the highest bidder should be the purchaser, and then averred that the defendant was the highest bidder, and became the purchaser at and for a certain large sum of money, *to wit, the sum of 172l.*

After judgment for the plaintiffs on demurrer, a writ of inquiry issued to assess the damages.

**ASSUMPSIT.** The declaration stated that the plaintiffs, theretofore, to wit, on the 13th August, 1836, by their auctioneers and agents in that behalf, and in pursuance of an order under the hands and seals of the Poor Law Commissioners for England and Wales in that behalf made, caused to be put up and exposed to sale by public auction certain cottages and premises situate and being in the parish of South Newington, in the county of Oxford, upon and subject to the following amongst other conditions of sale, that is to say, that the highest bidder should be the purchaser, the purchase-money be paid before the 22nd September then next, and the conveyance be prepared by and at the expense of the purchaser.

That on the said exposure to sale on the 13th day of August in the year aforesaid, the defendant was the highest bidder for, and then became and was in due form declared the purchaser of the said cottages and premises at and *for a certain large sum of money (to wit) the sum of 172l.* And thereupon afterwards, to wit, on the day and year last aforesaid, in consideration thereof, and that the plaintiffs, at the request of defendant, would perform and fulfil all things in the said conditions of sale contained on the part of the vendors to be performed and fulfilled, he the defendant then promised the plaintiffs to perform and fulfil everything in the said conditions of sale on his part as such purchaser to be performed and fulfilled. And although the defendant, in part performance of the said terms and conditions of sale and of his said promise, did then sign

*Quere*, whether without putting in evidence the agreement to purchase, the plaintiffs would be entitled to more than nominal damages.

*Held*, that such agreement does not require to be stamped, but is exempt from duty under the 86th section of statute 4 & 5 Will. 4, c. 76.

an agreement for the purchase of the said premises *at the said sum of 172l.*, under and subject to the aforesaid conditions of sale, &c. Averment of performance by the plaintiffs of their part of the contract. Breach, that the defendant did not nor would at any time before the commencement of this suit, prepare or cause to be prepared the conveyance of the said cottages and premises according to the conditions of sale, although often requested so to do, nor did nor would the defendant on or before the 22d day of September in the year aforesaid, or at any other time, pay or cause to be paid to the plaintiffs the said purchase-money, or any part thereof, &c.

The defendant pleaded two pleas, which are not material to the present question. The plaintiffs replied, and upon demurrer to the replication judgment was given for the plaintiffs. Upon this a writ of inquiry issued, directed to the sheriff of Oxfordshire, to assess the plaintiffs' damages.

At the execution of the inquiry the plaintiffs, after putting in evidence the order of the Poor Law Commissioners for the sale of the property and the conditions of sale, and proving the fact of the sale having taken place, closed their case. It was then objected by the defendant that no evidence had been given of the contract, or of the price for which the property was sold, to which it was answered, that the contract of sale, and the price agreed to be paid for the property appeared from the record. The undersheriff ruled that the contract must be produced. On its production it was objected that it was inadmissible for want of a stamp, and the undersheriff being of that opinion, refused to receive it, and directed a verdict for the plaintiffs, with nominal damages.

*Walesby*, in Easter Term last, obtained a rule to shew cause why a new inquisition should not be had.

*Kelly* and *Piggot* now shewed cause. The undersheriff was right in deciding that the contract must be put in

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evidence to entitle the plaintiffs to more than nominal damages. The declaration, after setting out the conditions of sale, avers that the defendant became the purchaser of the premises "at and for a large sum of money, to wit, 172*l*." The effect of this is only to charge the defendant as purchaser of the property, but not to fix him as the purchaser at any specific sum. The plaintiffs were therefore bound to shew by the contract the price which the defendant had agreed to pay, or the jury would have no measure by which they could estimate the damages. If there had been a plea of non assumpsit, the plaintiffs would not have been compelled to prove that the defendant purchased at the sum mentioned in the declaration, because the amount being laid under a videlicet would not be a material part of the contract: *Cooper v. Blick*(a). They must therefore, in this case, prove by evidence dehors the record what was the real price at which the property sold.

But, secondly, the contract was inadmissible for want of a stamp. This was not a contract or agreement made or entered into in pursuance of the rules, orders, or regulations of the Poor Law Commissioners, within the 86th section of the 4 & 5 *Will.* 4, c. 76. The property in question has belonged to the parish, and was sold by the guardians under the provisions of statute 5 & 6 *Will.* 4, c. 69, the 3rd section of which authorises the guardians of the union, with the approbation and subject to the rules, orders and regulations of the Poor Law Commissioners, to sell parish property. The question is, whether a sale with the approbation of the Poor Law Commissioners is necessarily a sale made in pursuance of their order, within the meaning of statute 4 & 5 *Will.* 4, c. 76, s. 86. The contract may be sanctioned by the commissioners, and yet not made or entered into in pursuance of their order. [*Patteson J.* The 86th section of statute 4 & 5 *Will.* 4, c. 76, also contains the words "or any other instrument made in pursuance of


(a) 2 G. &amp; D. 295.

*this act.*] There is no power in either of the acts by which the commissioners can compel the sale of any parish property, it can only take place by consent of a majority of the rate payers. The authority given is to sell with the approbation and subject to the rules of the commissioners, but the commissioners cannot make an order for the sale against the consent of the parishioners; the sale in the present instance, therefore, could not have been by their order, nor the contract one made or entered into in pursuance of their order.

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*Walesby and J. W. Smith* contra. This case has been argued for the defendant as if the objection arose upon special demurrer, and not after judgment by default. The question is, whether the price at which the defendant became the purchaser of the property appears with sufficient certainty upon the face of the record to authorise the jury to find that the plaintiffs have sustained damage to that amount. The declaration states the sale by auction in pursuance of the order of the commissioners under certain conditions of sale, one of which is, that the purchaser shall sign an agreement for the payment of the purchase-money. It then avers that the defendant became the purchaser at a large sum of money, "to wit, 172*l.*," and that the defendant did sign an agreement for the purchase of the said premises at *the said sum of 172*l.**, in pursuance of the conditions, and the breach is, that the defendant did not nor would pay or cause to be paid to the plaintiffs the said purchase-money. Assuming that the averment under a videlicet in the prior part of the declaration would not compel the plaintiffs to proof of the sum mentioned in the declaration as the precise sum at which the property was sold, this is cured by the subsequent averment, which is material, that the defendant signed the agreement for the purchase of the premises "at the said sum of 172*l.*" It cannot be contended that upon the whole declaration the price is left so uncertain that the Court, after judgment by




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default, cannot ascertain the amount. [*Patteson J.* The instrument signed is the contract. On non assumpsit pleaded the plaintiffs must have put in an agreement, then if an agreement had been put in for another sum, would the plaintiffs have been entitled to the verdict?] The contract in the declaration is to perform the conditions of sale; one of them is, the payment of the purchase-money. Can any one, looking at the whole declaration, avoid saying that the 172*l.* is the purchase money agreed to be paid?

Secondly, the contract was exempt from stamp by the provisions of the statutes 4 & 5 *Will.* 4, c. 76, s. 86, and 5 & 6 *Will.* 4, c. 69, s. 3. The two acts are, by the provisions of statute 5 & 6 *Vict.* c. 57, s. 18, to be construed together. The 86th section of statute 4 & 5 *Will.* 4, c. 76, is conceived in very general terms, and the averment in the declaration is, that the property was put up to sale in pursuance of an order under the hands and seals of the Poor Law Commissioners. The contract of sale was therefore made in pursuance of their order. This averment must be received in the sense most beneficial for the plaintiffs, and after judgment by default, the Court will not assume that the commissioners could not make such an order. The 105th section of statute 4 & 5 *Will.* 4, c. 76, enacts that rules and orders made by the commissioners shall continue in force until declared illegal by the Court of Queen's Bench. There was therefore an order *de facto* for making the contract, and although the 3rd section of the statute 5 & 6 *Will.* 4, c. 69, renders the consent of a majority of the rate payers necessary to the validity of a sale of parish property, yet the same section provides that sales made before the passing of the act, with the consent or approbation of the commissioners, shall be as valid and effectual as if the same had been directed by their order, under the authority of that act.

Lord DENMAN C. J.—If the undersheriff was right, the plaintiffs were obliged to give the agreement in evidence. It

was in fact produced, but the objection was then taken to the want of a stamp, and on this ground it was ultimately excluded. Taking both the statutes together I think the undersheriff was wrong in refusing to receive this instrument in evidence for the want of a stamp. It therefore becomes unnecessary to give an opinion upon the other point.

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PATTESON J.—This case clearly falls within the words of the 86th section of the 4 & 5 *Will.* 4, c. 76, which are very large, including not only any contract or agreement made or entered into in pursuance of the rules, orders and regulations of the Poor Law Commissioners, but also extending to any other instrument made in pursuance of that act. Now this is *de facto* a contract made in pursuance of the order of the Commissioners; it is so stated on the declaration, and the order of the Commissioners was put in evidence before the undersheriff. Perhaps it is not material, under the 105th section, whether they could in point of law make such an order or not, but it may be taken on the declaration that they could. Then the subsequent act makes good all sales which had taken place previously. I think the instrument requires no stamp.

On the other point I think there would be great difficulty in saying that the undersheriff was wrong.

WILLIAMS J.—I am of the same opinion. The declaration states that the sale was in pursuance of an order under the hands and seal of the Poor Law Commissioners. Then it must be presumed that the sale was under a regular order, and such as they had the power to make. The agreement for the purchase of the property is then clearly an instrument made in pursuance of the act, within the meaning of the 86th section of the 4 & 5 *Will.* 4, c. 76.

COLERIDGE J.—Under the second act the Commissioners have no power to direct a sale, unless by consent of

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a majority of the rate payers of the parish. But the guardians cannot sell unless by order of the Poor Law Commissioners. Then the Commissioners must issue their order, and the declaration states the sale to have been in pursuance of their order. Therefore the contract for the purchase of the property was a contract made and entered into in pursuance of such order, and therefore exempt from stamp.

Rule absolute.

THE QUEEN v. The Inhabitants of BEDINGHAM. (a)

Where the examination of an overseer purported to be his own individual complaint of a pauper's chargeability, and was signed by himself only, but the order of removal purported to have been made upon the complaint of the overseers, and, in point of fact, the complaint had been made by the single overseer on behalf of the overseers generally, and with their consent.

ON appeal to the Norfolk quarter sessions against an order for the removal of one *Quantril*, &c. from the parish of Bedingham to the parish of Earsham, both in this county, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

The order was in the common form, and, after reciting that complaint had been made unto two justices for the county of Norfolk by the “*overseers of the poor*” of the parish of Bedingham, directed the pauper to be removed from the respondent to the appellant parish. The order was made upon the examination of *John Smith*, one of the overseers of the respondent parish, and of *Quantril*, the pauper, and copies of the order for removal and of the examination, with the notice of chargeability, signed by the majority of the churchwardens and overseers of the respondent parish, were duly sent to the overseers of the appellant parish.

(a) Decided in Easter Term, 1844, (April 30).

*Held*, that the complaint was sufficient.

An examination stated that the pauper had gained a settlement in the appellant parish by hiring and service, and also that he had been repeatedly relieved by their parish while non-resident.

A ground of appeal denied that the pauper had acquired such settlement either by hiring and service or by any other means. *Held*, under this ground of appeal, that the appellants might shew that they had given the relief by mistake.

The information of the overseer commenced thus : " the information and complaint of *John Smith*, of &c., one of the overseers of the poor of the parish of Bedingham," and, after stating the inhabitancy and chargeability of the pauper, proceeded thus—" wherefore *I* pray that the said *Peter Quantil* (the pauper) may be examined on oath touching the place of his last legal settlement, and that such further proceedings may be had as the law in such case directs." This was signed by *Smith* only.

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The examination of the pauper set up a settlement in Earsham by hiring and service, and also stated that while resident in the respondent parish he had been repeatedly relieved by the overseers of Earsham.

The material grounds of appeal were, 1st. " That the order of removal was not and does not purport to have been made upon the complaint of the overseers of the poor of the said parish of Bedingham, but of *John Smith* only, described as being one of such overseers, and it does not appear upon the face of the information of the said *John Smith*, upon which the said order was founded, that he was authorised by the churchwardens and overseers, or by the overseers or guardians, of the said parish of Bedingham to make such complaint and information on his own and their behalf. 6th. That the pauper never acquired a settlement in Earsham either by hiring and service with the said S., (as alleged in the examinations,) or by any other means.

Upon the trial, as to the first ground of appeal, it was admitted that the application was made on behalf of the parish officers and with their consent, and the Court decided in favour of the respondents. Evidence was then given by the respondents of relief given by the appellant parish out of the poor-rate of that parish to the pauper occasionally for a period of twenty years, whilst he was residing in the respondent parish, and the respondents then closed their case.

The appellants then called on the Court to allow them to shew that such relief had been given under the mistaken belief that the pauper had gained a settlement in their

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parish by his hire with S. as stated in the examinations. To this the respondents objected on the ground that the notice did not state that as one of the grounds of appeal.

The Court permitted the appellants to call the pauper with reference to this point, who on examination admitted that seven or eight years previous to the present order he was examined before magistrates at petty sessions respecting his settlement, on the application of, and whilst he was residing in, the respondent parish, who refused to make an order, since which he had been relieved several times by the respondent parish whilst resident in it.

The Court quashed the order of removal, subject to a case for the opinion of this Court upon the following points: 1st. Whether there had been a sufficient complaint, to give the magistrates jurisdiction to make the order. 2. Whether the Court ought to have admitted the appellants to give the evidence objected to. The order of sessions to be quashed or confirmed as the Court may decide the questions submitted to them.

*B. Andrews* and *Gunning* in support of the order of sessions. The order of removal was made without jurisdiction, as the complaint was made by one overseer only, and the statute 13 & 14 Car. 2, c. 12, s. 1, does not authorise the removal of a pauper except upon complaint made by the churchwardens or overseers. It has been decided that notices by parish officers under the Poor Law Amendment Act must be given by the majority at least: *Reg. v. Justices of Cambridgeshire (a)*. Even under stat. 18 Geo. 3, c. 19, s. 5, which gives an appeal against the allowance of a constable's accounts, "in case the overseer or overseers shall find the parish aggrieved," it has been held that the majority of the parish officers must concur in the appeal: *Rex v. Justices of Lancashire (b)*. It would be most inconvenient to allow a single overseer to make the complaint,

(a) 7 A. & E. 480; S. C. 1 P. & D. 249.

(b) 5 B. & Ald. 755; S. C. 1 D. & R. 485.

and so initiate proceedings, which may throw great expense on the parish, although the majority of the parish officers may be of opinion that such proceedings ought not to be taken.

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2. Under the ground of appeal, denying that the pauper had gained a settlement by hiring and service, or by any other means, the appellants were properly allowed to shew that the relief given was given by mistake. The fact of relief is not denied; the settlement is denied, and the respondents did not attempt to support it, and the appellants had a right to shew that the relief, which is only *evidence* of a settlement, was inconclusive.

*Archbold* and *Palmer* contra. If it were necessary that the complaint of chargeability should be in writing, and signed, then undoubtedly it would be necessary that it should be signed by the majority. But the complaint need not be in writing. So undoubtedly the complaint, though it need not be in writing, must be virtually the act of the majority. But this requisite is satisfied if one parish officer make the complaint by authority of the majority.

It is said the appellants were entitled under their ground of appeal to shew that they relieved the pauper by mistake, inasmuch as relief is evidence only of a settlement. But relief is a "ground of removal," and therefore is within the very terms of 4 & 5 Will. 4, c. 76, s. 81, which does not use the words "grounds of settlement." Relief, therefore, being a substantive "ground of removal," should have been specifically denied, for all the grounds of removal stated in an examination should be either denied or confessed and avoided. If this ground of appeal meets the case of relief at all, it is by way of denial, and at the trial it was sought to meet the case by a confession and avoidance. [*Patteson* J. I think the ground of appeal rather admits the fact of relief, and denies the effect imputed to it.] It is quite uncertain what it admits or denies; and it seems as if the appellants had used all their astuteness to

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puzzle their opponents, whereas it is required that the grounds of appeal should be stated most explicitly: *Reg. v. Whitley Upper* (a). [*Patteson* J. Suppose the examination had stated nothing about hiring and service, and had stated the relief merely, and the appellants had said, "true, we relieved the pauper, but he did not gain a settlement;" they could not, after such a ground of appeal, have called upon the respondents to prove the fact of relief, but it does not follow that they could not themselves shew that the relief was not conclusive of the settlement.]

Lord DENMAN C. J.—I think the sessions were right on both points.

In the first place, I think the complaint of chargeability was sufficient. The complaint was made in the name of one overseer only; but the order of removal recites the complaint of all the overseers, and it was proved at the sessions that the complaint was made on behalf of and with the consent of all.

The other question is, whether the appellants should have been let into evidence that the relief given was given by mistake. I think the evidence was rightly admitted. The examination first states a settlement by hiring and service, and then states the relief. The relief alone (as my brother *Patteson* has put it) is a sufficient ground of removal, and, if no other ground had been stated, the appellants would have been at liberty to shew that the relief was given by mistake. But here the case is stronger, for both the hiring and service and the relief are stated, and the appellants deny that any settlement was gained by the hiring and service, "or by any other means," passing over the *fact* of relief in silence. The appellants did shew effectually that no settlement was gained, for they proved that relief had been several times given by the respondent parish after the magistrates had inquired into his settlement, and had refused to make an order.

PATTESON J.—I am of the same opinion. The complaint before the removing magistrates is not required to be in writing. If it was really the complaint of the overseers, that will do. It was admitted at the sessions, that this complaint was authorised by the body of the overseers, and the removing magistrates also shew by the terms of their order that they treated it as the complaint of all.

As to the other point, I have already expressed my opinion, that as there is a statement in the examination that relief was given, and the ground of appeal does not deny the fact, but says no settlement was gained, this is tantamount to a confession of the fact of relief, and to an avoidance of it, on the ground that the relief was given in error.

WILLIAMS J.—I am of the same opinion. One overseer had the authority of all.

I think the sessions were right also on the other point. The examination states a settlement by hiring and service, and by relief given, which is only evidence of a settlement. On the trial the respondents abandon the settlement by hiring and service, and rely upon the *evidence* of settlement generally. Surely the appellants were entitled to resist that like any other evidence.

WIGHTMAN concurred.

Order of Sessions confirmed.

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#### The QUEEN v. The Inhabitants of HIGH BICKINGTON(a).

ON an appeal against an order for the removal of *Ann Ford*, and her four children, from Atherington to High Bickington, both in the county of Devon, the sessions quashed the order, subject to a case.

(a) Decided in Easter Term, 1844, (April 21).

It is not sufficient evidence to ground the removal of a pauper, if the pauper, or other witnesses, state in the examinations

that the pauper is "chargeable" to the removing parish; chargeability being a conclusion of law, to be inferred by the justices from evidence of the pauper's having received relief from the parish,



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The evidence before the removing magistrates of the chargeability of the paupers to Atherington was as follows:—

The pauper said, "I and my said children are inhabitants of the said parish of Atherington, and are chargeable to the said parish of Atherington."

*John Pinson* said, "I am one of the relieving officers of the Barnstaple union, and administer the relief ordered for the paupers of the said parish of Atherington. The said *Ann Ford* and her said four children (naming them) are now chargeable to the said parish of Atherington."

Grounds of appeal, 1. That the said order, the examination on which it was made, and the notice of chargeability sent to us thereupon, are respectively bad on the faces thereof.

2. That the said examination contains no legal evidence that the said *Ann Ford* and her said four children, or any of them, were chargeable to the said parish of Atherington at the time of the application for making the said order of removal.

The Court confirmed the order, subject to a case upon this and another point.

*Rowe* and *Bevan* in support of the order of sessions. The word "chargeable" merely expresses a fact, and one to which the pauper, and still more the relieving officer, was perfectly competent to speak. In one sense of the word, it no doubt implies a conclusion of law; a person who is settled in a parish is legally chargeable to it; that is, legally entitled to relief; but in the present instance it merely expresses the fact of receiving relief from the removing parish, which is a necessary preliminary to removal from it. In this sense the word is used in 35 *Geo. 3*, c. 101, s. 2, which enacts, that no poor person shall be removed "until such person shall have become actually chargeable to the parish, township or place in which such person shall then inhabit."

*Greenwood* and *Merivale*, contra, were not called upon.

Lord DENMAN C. J.—It appears to me that the removing magistrates have received as evidence an assertion of that which is properly a conclusion of law from evidence. If the witnesses had stated the fact of relief having been administered to the pauper by the removing parish, the justices would then have been in a position to draw the inference that the pauper was chargeable to it. As it is, the witnesses have stated the inference instead of the facts which led to it.

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PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

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The QUEEN v. The Inhabitants of LIDFORD (a).

On appeal against an order for the removal of *James Leaman* from the parish of Widdecombe in the Moor to the parish of Lidford, the court of quarter sessions for the county of Devon confirmed the order, subject to a case, which set out the examinations. The pauper *James Leaman* said, in his examination, "I am chargeable" to the parish of Widdecombe in the Moor.

Same point. Where, in addition, the examinations were headed as concerning the settlement of A. B. "chargeable to" the removing parish: *Held*, not sufficient evidence of chargeability.

The relieving officer for the union in which Widdecombe in the Moor is situate said, in his examination, "*James Leaman* is chargeable to the parish of Widdecombe in the Moor." All the examinations were headed, "The examination of, &c. touching the settlement of *James Leaman*, resident in and chargeable to" the same parish. The same objection was raised on the ground of appeal as in *Reg. v. The Inhabitants of High Bickington* (b), and the same question was raised, among others, by the case for the decision of the Queen's Bench.

*Merivale*, in support of the order of sessions, contended, on the authority of *Res v. Inhabitants of Rotherham* (c), that the heading of the examinations might be considered as supporting the statement that the pauper was chargeable.

*Greenwood* and *Rowe*, contra, were not called upon.

Per CURIAM (d).—

Order of Sessions quashed.

(a) Decided in Trinity Term, 1844, & D. 523.  
 (June 1st).

(b) *Ante*, 103.

(c) 2 Q. B. 557, (n.); S. C. 2 G.

(d) Lord Denman C. J. *Patteson*,  
*Williams* and *Coleridge* Js.

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## The QUEEN v. The Justices of SURREY (a).

Where the signature of an overseer to the grounds of appeal against an order of removal purported to have been made by proxy, and it did not appear that the proxy had been authorised to sign, the signature was held insufficient.

A member of the board of guardians of a union, constituted by the Commissioners under the 38th section of the act, is not a guardian of the parish, within the meaning of the 81st section, and not capable of signing the statement of grounds of appeal.

**CHARNOCK**, in Michaelmas Term, 1843, had obtained a rule for a mandamus to the justices of the county of Surrey, commanding them to enter continuances and hear the appeal of the parish of Allhallows the Great, in the city of London, against an order of justices for the removal of one *Susannah Legge*, widow, and her five children, from the parish of Wimbledon to the said parish of Allhallows the Great.

It appeared that notice of appeal had been duly served on the respondent parish, and the appeal entered at the Easter sessions for the county of Surrey, and respited by order of the Court till the Midsummer sessions then next, at which time it came on to be heard. The statement of the grounds of appeal was signed in the following manner:

|                                                                                                                   |   |                                                                                       |
|-------------------------------------------------------------------------------------------------------------------|---|---------------------------------------------------------------------------------------|
| <p><i>Wm. Ryde, Thomas Gooch;</i><br/>for <i>W. Hammond, W. P. Hammond,</i><br/><i>John Elsdén</i>, Guardian.</p> | { | <p>Churchwardens and<br/>Overseers of the<br/>parish of Allhallows<br/>the Great.</p> |
|-------------------------------------------------------------------------------------------------------------------|---|---------------------------------------------------------------------------------------|

There were two churchwardens and two overseers of the parish, which forms part of the city of London Union, being one of the unions formed by order of the Poor Law Commissioners, under statute 4 & 5 Will. 4, c. 76, and *John Elsdén*, whose signature was affixed to the statement of the grounds of appeal, was the member of the board of guardians of the said union elected for the parish of Allhallows the Great. It was objected at the sessions that the statement of the grounds of appeal was not given under the hands of the overseers or guardians of the appellant parish, or any three or more of such guardians, within the meaning of the 81st section of the 4 & 5 Will. 4, c. 76, and the sessions being of that opinion dismissed the appeal.

(a) Decided in Easter Term, 1844, (April 22).

*Wallinger* and *Corner* now shewed cause against the rule. Where the parish is under the management of overseers, a majority of the parish officers must sign the statement of the grounds of appeal; but, where parochial affairs are regulated by guardians, the statement of grounds may be signed by the guardians of the parish, or any three or more of them. In the present case, two only of the parish officers have signed, namely, *Ryde* and *Gooch*. There is no statement that *W. P. Hammond* had authority to sign for *Wm. Hammond*; nor had the latter any power to delegate his authority: *Reg. v. Justices of Worcester* (a). The notice of appeal there was signed by the attorney of the appellant parish, as attorney for and on behalf of the churchwardens and overseers, and it was proved that it was read over to the overseers, and that they authorised him to sign it as their attorney; the Court held the statute had not been complied with. It is clear, therefore, that the notice of appeal has not been signed by a majority of the churchwardens and overseers, and is therefore bad: *Reg. v. Justices of Warwickshire* (b). With respect to the signature of the guardians, *Elsden* was in fact not guardian of the parish, but a member of the board of guardians of the union, under the 38th section of the act, and therefore incapable under that section of acting, except as a member of and at a meeting of the board, and even in that case the section requires the presence and concurrence of at least three members. The words "guardians of the parish," in the 81st section, apply to parishes under the provisions of Gilbert's Act, stat. 22 Geo. 3, c. 28. But the parish of Allhallows the Great is a member of the city of London Union, and *Elsden* the guardian elected under the Poor Law Amendment Act; he does not describe himself by signature as guardian of the parish, but simply a guardian, which means here member of the board of guardians of an union, constituted

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(a) 1 Will. Woll. & Hodg. 152.

(b) 6 Ad. & Ell. 871; S. C. 2 N. & P. 153.

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by the Poor Law Commissioners under the 38th section of the 4 & 5 *Will.* 4, c. 76. He is therefore incapable of acting, except as a member of the board.

*Charnock* and *Arnould* contra. This point has never been before the Court before. But a comparison of the provisions of Gilbert's Act with those of the 5 & 6 *Will.* 4, c. 76, shews that it was the intention of the legislature to invest the guardians with all the powers possessed by the overseers. The preamble of Gilbert's Act recites the incapacity, negligence and misconduct of overseers, and the 7th section invests the guardians with all the powers and authorities given to overseers of the poor, and enacts that the guardian of the parish "shall to all intents and purposes, except with regard to the making and collecting rates, be an overseer of the poor for the parish or township for which he shall be appointed guardian." The same causes, namely, the incapacity, negligence and misconduct of the overseers, occasioned the Poor Law Amendment Act. If then the legislature in the 5 & 6 *Will.* 4, c. 76, had intended to limit the powers of guardians, it would have done so in express terms. The provisions of the 38th section apply to acts which affect the whole union, but a guardian, who is a member of the board, may still act as a parish officer with respect to his particular parish, and he is styled, at the conclusion of the 38th section, guardian of the parish. The words guardian of the parish, therefore, in the 81st section, may mean a guardian of a union under the 4 & 5 *Will.* 4, c. 76, as well as a guardian of a parish under Gilbert's Act. [*Patteson* J. The words "guardians of the parish," in the 81st section, are satisfied by the provisions of the 39th section.]

But the statement of grounds is in fact signed by a majority of the parish officers. There is nothing in the act which requires the parties signing to describe themselves as parish officers, and the Court will not assume that the party signing was not a parish officer; neither does the case

of *Reg. v. Justices of Worcester* (a) apply, for that was a delegation by the parish authorities to their attorney of a duty which the act requires to be done by themselves; but here, two of the parish officers sign with their own hand, and the third, for any thing that appears, may have been present, and consenting to the act, but incapable of affixing his signature.

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**LORD DENMAN C. J.**—The justices have done right. If the act requires the notice and statement of the grounds of appeal to be under the hands of the overseers, then the justices ought to see that it is so. A person signing for another does not shew that he has the authority of the other, or that the other was present at the deliberation, and gave his assent to the act done. The signature of the guardian does not affect the case, for he is not a parish officer, but a member of the board of guardians of the union, constituted under the 38th section of the act.

**PATTESON J.**—The 81st section says specifically that the statement in writing of the grounds of appeal shall be under the hands of the overseers, not of the parish officers, of the parish appealing against the order. But the guardian is not a parish officer. I cannot find any clause which makes a guardian under the 38th section of the new act a guardian of the parish. He is a member of the board of guardians of the poor for the union. The words in the 81st section, directing the notice of appeal to be given by the guardians of the parish appealing against such order, or any three or more of them, applies to the case where the union consists of a single parish, under the 39th section.

**WIGHTMAN J.**—In the case of a party signing for another, it ought to appear expressly that he had the authority of that other, which is wanting here. But it is argued that the addition of the guardian makes up the deficiency and

(a) 1 Will. Woll. & Hodg. 152.

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constitutes a majority of parish officers signing the statement of the grounds of appeal. But, assuming the guardian to be a parish officer, the 38th section of the act contains a proviso expressly excluding his power to act in virtue of his office except as a member, and at a meeting of the board. The justices therefore were quite right in holding that the notice and statement of the grounds of appeal were not signed in compliance with the statute.

Rule discharged.



The QUEEN v. The Inhabitants of ST. GILES IN THE  
 FIELDS, MIDDLESEX (a).

Relief administered by a parish to a pauper in the house of a contractor for the maintenance of paupers locally situated out of the parish is no evidence of an acknowledgment of settlement.

UPON an appeal against an order of two justices for the removal of *W. Conqueror*, his wife and two children, from the parish of Ashton under Lyne to the parish of St. Giles in the Fields, the sessions confirmed the order, subject to a case stated by the chairman, which was in substance as follows:—

In the year 1823, *W. Conqueror*, being a pauper in the parish of St. Giles, was sent at the expense of that parish to Cresbrook in Derbyshire, where he remained till July 1829; when, being out of work, and in a state of destitution, he went direct from Cresbrook to the said parish of St. Giles to obtain relief. He was then, and on several other occasions whilst living in St. Giles's parish, relieved by that parish, and in the ensuing winter, being again chargeable to the said parish of St. Giles, he was taken into the workhouse of that parish, which is situate within the limits thereof, and remained there some months, and until he was sent from thence, with other paupers, to Islington, out of the limits of the parish of St. Giles in the Fields, to the establishment of one *Perry*, a contractor for maintenance of paupers on behalf of that and other parishes,

(a) Decided in Easter Term, 1844, (April 24).

where he was maintained for some time at the expense of the said parish of St. Giles in the Fields; and shortly after leaving that establishment, the pauper, being again chargeable, was admitted by order of the parish officers of St. Giles into the Surrey Asylum, which is a similar establishment, and locally situate out of the limits of the parish of St. Giles.

Upon these facts it was contended on behalf of the appellants that *Perry's* establishment at Islington and the Surrey Asylum, though each locally situate in another parish, were to be considered quoad all matters relating to the settlement of the pauper as integral parts of the parish by which the maintenance was defrayed, and that there was no evidence of any such relief given to the pauper whilst residing in another parish, as constituted an admission of his being settled in the appellant parish. But the Court of Quarter Sessions were of opinion that on the whole there was such evidence upon the facts as above stated.

The question for the opinion of this Court was, whether there was evidence of such relief as amounted to an acknowledgment of settlement by relief. If the Court should be of opinion that there was, then the order to be confirmed; if otherwise, then the order to be quashed.

*Townsend*, in support of the order of sessions. The principle upon which it has been held, that instances of relief administered by a parish to a pauper within the parish are not to be taken against the parish as admissions of the pauper's settlement, is laid down by Lord *Ellenborough* in *Rex v. Chatham (a)*, viz.: that "if the parish officers, by giving relief to a pauper, were to be making evidence against themselves as to his settlement in their parish, it would make them perform their duty to casual poor with great reluctance." But the relief in the present instance is either relief out of the parish, in which case according to the well known rule it is evidence against it: or, if the contractor's house at Islington and the asylum in Surrey are to

(a) 8 East, 498.

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be placed for this purpose on the same footing as if they were locally within St. Giles's, then it is at all events relief administered in such a manner, and for such a period, as to exclude altogether the supposition of the pauper's being treated merely as casual poor: the principle, therefore, of *Rex v. Chatham* (a) does not apply. It seems unreasonable that a few instances of relief out of the parish should be considered as an acknowledgment by it, while the most continuous and systematic relief administered within the parish is not. When the relief is extended over months, and administered in more than one place out of the parish itself, the fair inference is that the pauper either has no settlement or is settled there. [Lord Denman C. J. In what manner does it differ from relief equally continuous afforded in a workhouse situated in the parish?] At all events, this was an inference which the sessions were fully entitled to draw: and, that court having drawn it, their decision will not be disturbed: *Rex v. Edwinstowe* (b); *Rex v. Trowbridge* (c). In Gilbert's Act, 22 Geo. 3, c. 83, s. 39, a provision is introduced expressly with the view of preventing children born in workhouses from gaining a settlement in the parish in which the workhouse is situate: which would have been unnecessary if, for purposes of settlement, the workhouse was part of the respective parishes which contribute to it.

*M. Chambers*, contra, was not heard.

LORD DENMAN C. J.—In my opinion the sessions have submitted this case to us in very proper terms. They have asked, whether, under the circumstances stated, there was evidence of relief amounting to an acknowledgment. I think there was not. *Rex v. Chatham* (a), *Rex v. Colestan* (d), establish the general principle that relief in the parish is no such acknowledgment: nor even *prima facie* evidence of it. And the reason given by Lord Ellenborough in the former of these cases is one of great weight. It seems

(a) 8 East, 498.

(c) 7 B. & C. 252; S. C. 1 M. & R. 7.

(b) 8 B. & C. 671.

(d) 1 B. & Ad. 25.

highly necessary that parish officers should have no motive to withhold assistance from casual poor through fear of making evidence against themselves. Here the pauper is at first relieved within the parish, and then carried to a poor house out of the parish. Under such circumstances the locality of the poor house is quite immaterial. It is virtually in the parish.

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PATTERSON J. being a rated inhabitant of St. Giles's took no part in the judgment.

WILLIAMS J. We are not interfering with any inference drawn by the sessions from evidence. They send a case to us expressly to ask whether there was any evidence of the contested fact; and we hold that there was none. The general rule is established beyond doubt, that relief administered in a parish is no evidence of settlement. It is now contended, in substance, that if sufficiently great, and sufficiently continuous, it may amount to such evidence. That would raise a disputable question in any case, whether the evidence is sufficient or not. It is better to adhere to the general rule, which cannot be varied by the mere fact that the poorhouse is locally out of the parish.

WIGHTMAN J. concurred.

Order of Sessions quashed.

The QUEEN v. The Justices in and for the parts of KESTVEN in the county of Lincoln(a).

G. T. WHITE, in Michaelmas Term last, obtained a rule to shew cause why a mandamus should not issue to the

(a) Decided in Easter Term, 1844, (April 25th).

The Court will not entertain a case sent to them from the sessions, where

an alternative of the question proposed involves the necessity of sending the case back to be heard.

The sufficiency of grounds of appeal in point of particularity of statement is a question for the sessions, and, where they have come to a decision upon the point, this Court will not grant a mandamus to enter continuances and hear the appeal.

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justices in and for the parts of Kesteven, in the county of Lincoln, commanding them to enter continuances upon the appeal of the churchwardens and overseers of the poor of the parish of Great Ponton in the said parts, against an order under the hands and seals of two of the said justices, for the removal of one *Miriam*, the wife of *William Welbourn*, and her four children, from the township of Spittlegate, in the said parts, to the said parish of Great Ponton, and to hear the said appeal.

It appeared from the affidavits that due notice of appeal, together with a statement of the grounds of appeal, had been served on the respondents, and that the appeal was duly entered and came on for hearing at the quarter sessions on the 16th October, 1843. The examination disclosed a settlement of the pauper's husband by apprenticeship to one *John Greene*, and residence in the parish of Great Ponton for more than forty days under the indentures.

The grounds of appeal, after denying that the said *William Welbourn* slept the last night of his apprenticeship in the parish of Great Ponton, proceeded as follows:—"And also that he the said *William Welbourn*, after his service with his master the said *John Greene* for part of the said term of the said apprenticeship, with the consent of his the said *William Welbourn's* said master, to wit, from May or June, 1833, to the end of the same term, served one *Samuel Nowell*, of Grosvenor Wharf, Pimlico, in the county of Middlesex, builder, under the said indentures in the said examination mentioned, in the parish of Harlaxton, in the said parts of Kesteven, in the said county of Lincoln, and inhabited and resided therein more than forty days during such service."

It was objected at the hearing that this ground was bad for want of particularity in not specifying the particular house in Harlaxton in which the said *William Welbourn* resided, nor giving the name of the landlord. The justices were of this opinion, and confirmed the order, subject to a case for the opinion of the Court of Queen's Bench, whe-

ther the above statement of the grounds of appeal was insufficient in particularity; if the said Court should be of that opinion, then the order of removal to stand confirmed, but, if they should be of a contrary opinion, *continuances to be entered*, and the justices to proceed to hear the appeal.

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*Mellor* now shewed cause. The appellants are not entitled to a mandamus, for they have applied to the sessions for a case for the opinion of this Court, which has been granted them. The Court, therefore, will not interfere by mandamus, as the parties have a different remedy, which it is their duty to pursue. *Rex v. Justices of West Riding(a)*, *Rex v. Justices of Suffolk(b)*. If the appellants had intended to come to this Court for a mandamus, they ought to have refused the case; but, having applied for it, they are bound to bring it up.

But the Court of Quarter Sessions have in fact heard the appeal. A mandamus will only be granted where they have declined to exercise their jurisdiction; where they have entertained the case, this Court will not question the propriety of their decision. There are two classes of objections to examinations and grounds of appeal; the first, that they are not sufficient in substance, the other, that they are not stated with sufficient particularity to entitle the party alleging them to be heard. The latter is a question peculiarly for the Court of Quarter Sessions, and with which the Court expressly refuses to interfere: *Reg. v. Charlbury and Walcott(c)*, *Reg. v. Kingsclere(d)*. The Court of Quarter Sessions, therefore, are to decide whether the grounds of appeal are or are not sufficiently particular, they have done so in the present instance, and this Court will not interfere with their jurisdiction by reviewing their decision, and compelling them to come to a particular

(a) 1 A. & E. 606; S. C. 3 N. & M. 757.

(b) 6 Ad. & Ell. 109; S. C. 1 N. & P. 306.

(c) 3 Q. B. 378; S. C. 3 G. & D. 177.

(d) 3 Q. B. 388; S. C. 3 G. & D. 177.

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conclusion on the point. *Reg. v. Justices of Carnarvon*(a), *In re Pratt*(b), *Ex parte Broseley*(c), *Reg. v. Recorder of Pontefract*(d). The mistake arises in terming the present a preliminary objection, and treating it as if the sessions had declined their jurisdiction. In the cases of *Rex v. Justices of Derbyshire*(e), and *Reg. v. Justices of Carnarvonshire*(f), which will be cited on the other side, this appears to have been assumed by the Court; but the latter case was decided on the ground that the subject-matter of the appeal, namely, the acknowledgment of the pauper, was peculiarly within the knowledge of the respondents, and therefore particularity of statement by the appellants was not required.

*Whitehurst* contra. This Court will not entertain the case where one alternative of the question presented for their decision involves the necessity of sending the appeal back to the sessions to be heard: *Reg. v. Wistow*(g). In that case the question was whether the grounds of appeal had been served in time, if the Court should be of that opinion the order to be confirmed, if not, the appeal to be respite. Under these circumstances, if a mandamus to compel the justices to hear the appeal should be refused, great injustice would be done.

But the appellants are in fact in the same position as if nothing had been said about a case at the sessions, or as if they had refused to accept the case in the shape offered them, *Reg. v. Justices of West Riding, in re Township of Charlton*(h), and therefore clearly entitled to have their appeal heard, if the grounds of appeal have not been stated with sufficient particularity. This question has continually

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| (a) 4 B. & Ald. 86.              | (e) 6 Ad. & Ell. 885; S. C. 1 |
| (b) 7 Ad. & Ell. 27; S. C. 2 N.  | N. & P. 703.                  |
| & P. 102.                        | (f) 2 Q. B. 325; S. C. 1 G. & |
| (c) 7 Ad. & Ell. 423; S. C. 2 N. | D. 423.                       |
| & P. 355.                        | (g) 1 G. & D. 681.            |
| (d) 2 Q. B. 548; S. C. 2 G. &    | (h) 11 Law Jour. (N.S.) Mag.  |
| D. 701.                          | C. 84.                        |

arisen upon the sufficiency of notices of appeal, and the rule is, that where there has been a hearing of the appeal this Court will not interfere, but where the appeal has never been heard, they will grant a mandamus, if the sessions have come to a wrong conclusion upon a preliminary objection. This was expressly decided in the case of *Reg. v. Justices of Carnarvonshire (a)*. The sessions there had decided that certain grounds of appeal were defective for want of particularity, this Court thought that one of the grounds of appeal was sufficient in that respect, although a specific settlement which formed one of them was imperfectly stated. The question there turned wholly upon the sufficiency of the grounds of appeal with respect to particularity of statement, and the Court made the rule absolute for a mandamus, on the ground that the sessions had taken an erroneous view on a preliminary point, and refused to hear the case. *Reg. v. Justices of West Riding (b)*. (*Keighley v. Wilsden*) is to the same effect. Where the appellants give such grounds of appeal as are contemplated by the act of parliament, they have a right to be heard, so that the question turns wholly on the sufficiency of the grounds of appeal. He then proceeded to argue that the grounds of appeal were stated with sufficient particularity.

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LORD DENMAN C. J.—We cannot vary the question before the Court by discussing the sufficiency of the grounds of appeal in point of particularity.

It must now be taken as an established rule that this Court will not decide a case submitted to them, merely to send it down again to the sessions.

The other question involves the necessity of overruling some of our previous decisions, because I think that the decision in the case of *Reg. v. Justices of Carnarvonshire (a)* is wrong, and that the case of *Reg. v. Justices of West Riding (b)* is still more wrong. The Court in these two cases took upon themselves to say, not that the Court of Quarter

(a) 2 Q. B. 325; 3 C. 1 G. & D. 423.

(b) 2 Q. B. 331.

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Sessions had done wrong in refusing to hear, but that, having heard, they had come to a wrong conclusion. In the case of *Reg. v. Justices of Carnarvonshire(a)* the sessions in appearance decided upon a preliminary objection, but if they decided upon matter of fact we were bound by their decision. I abide by the opinion of my brother *Coleridge (Reg. v. Bridgwater(b))* that the sessions are to decide on the sufficiency of grounds of appeal with regard to particularity, it depending on many circumstances of which the Court below alone can properly judge.

This is no new doctrine, but has been before insisted on by the Court. We are now to say aye or no, whether we were right in the conclusion to which we came in the two cases before mentioned. I think we were wrong.

PATTESON J.—If the sessions really entertain so much doubt on a question of this sort as to grant a case, they should go on to hear out the appeal; and for the future they ought not to grant a case for the opinion of this Court where the question submitted will not decide the appeal. I do not think that Mr. *Whitehurst* was entitled to say that the appellants are not bound to bring up the case. Because, if the Court grant a case in a form which amounts to no case, the party should say at the time this is no case at all, and I will not take it in that shape. Then he would be in a situation to come to us and ask for a mandamus, but that has not been done here. Most probably the parties at the sessions were not aware of the decision, and did not know that the Court would refuse to entertain the question submitted to them in this case. As to the other point, when the question is, whether sufficient information has been given by the appellant to the other party in his notice of appeal, that is a matter which the sessions must determine, and upon which they have come to a decision.

WILLIAMS J.—*Reg. v. Justices of Carnarvonshire(a)* rests

(a) 2 Q. B. 325; S. C. 1 G. &  
 D. 423.

(b) 10 A. & Ell. 693; S. C. 1  
 G. & D. 265.

upon a misapplication of the word preliminary point. But in this case all is quite clear; the appeal has been heard and determined. It might be said with equal justice in a case where part of the witnesses only had been heard, and the other evidence rejected by the Court, that the case had not been heard at the sessions. But that is not so, the Court would not in such a case have declined their jurisdiction, but have exercised it, whether their determination was right or wrong. So this case has been heard and decided by the Court of Quarter Sessions.

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WIGHTMAN J.—The first case proceeded upon an erroneous view of what was to be considered a preliminary objection. If the objection there taken had been strictly of a preliminary nature, the decision would have been well-founded. But that was not so; particularity of statement in the grounds of appeal is matter of fact for the decision of the sessions, and, where the Court has decided upon matter of fact, and not on a mere question of practice, this Court is not in the habit of interfering with the decision at which they have arrived.

Rule discharged.

The QUEEN v. The Inhabitants of LEEDS (a).

ON appeal against an order for the removal of one *Redmayne*, &c. from the township of Preston to the township of Leeds, the sessions confirmed the order, subject to the opinion of this Court upon a case.

The examination of the pauper stated, "In the month of May, 1820, I became the tenant of a house in Kirkgate, in Leeds, &c. &c. (describing the landlord and the situation of the house). I took the house for a year, as I believe, at 19*l.*, but I am not certain whether it was a pound more

An examination of a pauper stated that he "took a house for a year at a rent of 19*l.*, and paid rent for the whole time of the tenancy."

*Held* not to shew payment of rent for a year.

(a) Decided in Easter Term, 1844, (May 1).



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or less. I entered into and resided in the house in the said month of May, and continued to reside upon it with my family until the month of October, 1821, when I left it.

*I paid rent for the whole time of my tenancy."*

One of the grounds of appeal stated, "that the examinations are insufficient, &c. inasmuch as they do not state the house therein mentioned to have been a separate and distinct dwelling house, bonâ fide hired at and for the sum of 10*l.* a year at the least; and inasmuch as they do not state that such house was held and the rent for the same actually paid for the time of one whole year at the least by the said *Redmayne*, who is alleged to have been the person hiring the same."

The sessions at the trial overruled the objection contained in the above ground of appeal, and confirmed the order, subject to the opinion of this Court.

*Cowling* in support of the order of sessions. The principal objection seems to be that the examination does not shew that "the rent was actually paid for the term of one whole year at the least by the person hiring," as required by stat 59 *Geo.* 3, c. 50. But a witness is not required to give his evidence in legal language. If this examination is construed in the ordinary sense of language, according to the rule laid down in *Reg. v. Pilkington (a)*, the payment of rent for the year sufficiently appears. The words "rent for the whole time of my tenancy" necessarily imply payment of the rent for a year.

*Hall* contrâ, referred to *Reg. v. Pontefract (b)*.

*Whigham* and *Pashley*, on the same side, were not heard.

Lord DENMAN C. J.—We cannot find a settlement on the face of this examination. It is unfortunate that the

(a) 3 G. & D. 319.

(b) 2 Q. B. 548; S.C. 2 G. & D. 701.

omission of a little word "the" should make all the difference.

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PATTERSON, WILLIAMS and COLERIDGE Js. concurred.

Order of Sessions quashed.

**The QUEEN v. The Justices of MERIONETHSHIRE (a).**

A RULE nisi had been obtained for a mandamus to the justices of Merionethshire to enter continuances and hear and determine an appeal against an order of removal between the parishes of Denio, appellants, and Llangar, respondents.

In this case, as appeared from the affidavits, an order had been made by two justices of Merionethshire for the removal of certain paupers from Llangar to Denio. Notice and grounds of objection were served on March 19th in this year by the parish of Denio. On receiving these grounds of appeal, which pointed out defects on the face of the examination, the parish of Llangar applied to the removing justices, and obtained a supersedeas of the order. This supersedeas was served on Denio on March 29th, but accompanied with no offer for the payment of costs. On the 9th April following, the parish of Llangar obtained and sent a fresh order, and copies of examinations, to the parish of Denio, and at the same time tendered 2*l.* 2*s.* in payment of the expenses occasioned by the first order. The parish of Denio refused the tender, costs to a much larger amount having been incurred, and went to the sessions, which were held on April 12th, and applied to enter the appeal. On these facts appearing, and the parish of Llangar repeating their offer of paying 2*l.* 2*s.* costs, the sessions refused to entertain the appeal.

(a) Decided in Trinity Term, 1844, (June 6th).

upon the circumstances of each particular case as to the amount of awards to parties to appeals against orders of removal.

Where an order of removal had been superseded, *held*, that the quarter sessions were nevertheless bound to allow an appeal to be entered against it, for the purpose of getting the proper amount of costs allowed, although the respondents had tendered the appellants, before sessions a sum larger than that which, by a standing order of the Court of Quarter Sessions in question, was allowed on the trial of appeals against orders of removal.

*Semble*, that the Court of Quarter Sessions ought to exercise a discretion

costs which it

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It was stated in the affidavits on the part of the respondent parish, that "there is and has been for a great many years last past a standing rule or order on the books of the quarter sessions of the peace for the said county of Merioneth, whereby it is ordered that the sum of 30s. only as and for costs and expenses shall be allowed on appeals against orders of removal tried in the said Court, to either party."

*Jervis* now shewed cause on behalf of the respondent parish Llangar, and contended that although, as a general rule, an appellant parish has the power to enter an appeal against an abandoned order for the purpose of obtaining costs, yet in this instance the Court of Quarter Sessions was justified in not allowing it to be entered, inasmuch as the tender already made by the respondents exceeded the amount which the appellants could have recovered, by the standing order of the Court, if they had gone on to trial.

*W. Yardley* shewed cause for the justices.

*Welsby* contra. This standing order is not stated with sufficient precision. It should have been not mentioned by way of recital, but extracted from the order book of the sessions, in order that this Court might accurately judge of its effect. Even if such a rule or order exists, it may not apply, for anything that appears, to cases where the appeal is not tried, but the order quashed without resistance. But, at all events, such a rule cannot be relied on against the general principle established in the cases of *Reg. v. Townstall* and *Reg. v. Stayley(a)*, that although an order of removal has been abandoned, and an offer made to pay all reasonable costs, the parish to which it is directed has nevertheless a right to enter an appeal for the purpose of getting the proper amount of costs ascertained by the sessions. The justices cannot legally refuse altogether to exercise their judgment on this subject, the 82nd section of the Poor Law

(a) 3 Q. B. 357; S. C. 2 G. & D. 676.

Amendment Act contemplates that they will allow reasonable costs.

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LORD DENMAN C. J.—I think the standing order and practice of the Court of Quarter Sessions are sufficiently stated in these affidavits. But the question before us is, whether that Court has acted legally in refusing to allow this appeal to be entered. I think it has not; that it was bound to allow the entry. And I am also of opinion that the quarter sessions ought to exercise a discretion as to the amount of costs. It is quite right that the parties to whom an order is directed should be able to obtain the reasonable costs occasioned them by it, whatever those may be.

PATTESON J., concurred.

COLERIDGE J.—It appears to me that the justices were clearly wrong in refusing to allow the appeal to be entered. Still I think we should not be warranted in allowing the mandamus to go, if we thought the quarter sessions would act on the practice imputed to that court in these affidavits. But such a practice appears to me very unreasonable.

WIGHTMAN J., concurred.

Rule absolute.

The QUEEN v. The Inhabitants of SHIPSTON-ON-STOUR (a).

ON an appeal against an order of *Wm. Dickens*, Esq. and *H. Townsend*, clerk, for the removal of *Sarah Sutton*, from Atherstone-on-Stour to Shipston-on-Stour, the sessions quashed the order, subject to a case. This case was drawn

An examination taken for the removal of a pauper must shew, on the face of the document, that it was taken before two justices of the peace.

(a) Decided in Trinity Term, 1844, (May 29).

Where, therefore, such an examination was stated in the jurat to be "taken before us, *W. D.*, *H. T.*," not adding, "justices of the peace," &c. Held bad, although the examination of another witness standing first on the same sheet of paper was headed, "taken before us *W. D.* and *H. T.*, justices of the peace," &c.

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two classes of documents. Now if the examination of *Patience Randall* stood alone, there could be no doubt on this point. No jurisdiction appears in it. Can this defect be supplied by reference to another document? It may appear hard to answer in the negative. But if this were allowed, on the ground that they are on the same paper, we should next be asked to come to the same conclusion by reason of the similarity of the handwriting of the signature. It is, in short, admitting circumstances in the nature of parol evidence to supply defects in a document. I think, also, we must assume that the copy sent to the appellants is for this purpose the same as the document itself.

Order of Sessions confirmed.

The QUEEN v. The Earl of DARTMOUTH and others(a).

The power of justices to allow accounts, submitted to them annually by overseers on their going out of office, under 50 Geo. 3, c. 49, s. 1, is not taken away by 4 & 5 Will. 4, c. 76, s. 47, which requires the overseers to have their accounts passed quarterly before an auditor appointed by the Poor Law Commissioners.

SIR F. POLLOCK A. G. in Michaelmas Term last obtained a rule calling upon the Earl of Dartmouth and two others, justices for the county of Stafford, to shew cause why a mandamus should not issue commanding them to make an order for the payment, by the late overseers of the poor of the parish of West Bromwich in the said county, of the sum of 103*l.* 6*s.* 5*d.*, to the present overseers of the parish, and if necessary to issue a warrant under their hands for levying the said sum by distress and sale of the goods and chattels of the late overseers.

The rule was obtained upon affidavits containing the following statements. The parish of West Bromwich forms part of the West Bromwich Union. The late overseers of the parish were in office from Lady day 1842, to Lady day 1843. Each quarter during their year of office,

(a) Decided in Easter Term, 1844, (April 24).

Therefore

where a sum, disallowed by the auditor at his quarterly audit of such accounts, was afterwards allowed by justices in passing the annual account, the Court refused a mandamus to justices requiring them to order the overseers to pay over to their successors the sum which had been so disallowed by the auditor.

they submitted their accounts for examination to the auditor appointed for the Union by the Poor Law Commissioners. On the 30th January, 1843, the auditor disallowed items in their accounts amounting to 82*l.* 11*s.* 4*d.* After their year of office and about the 1st April 1843 they submitted their accounts to two justices. The auditor attended on this occasion, and finding that the items he had disallowed were again inserted in the accounts among the subsequent items, informed the justices of his disallowance, and protested against their allowance by the justices. The justices allowed the accounts notwithstanding.

On the 24th April the late overseers submitted their accounts again to the auditor, who again disallowed the same sum of 82*l.* 11*s.* 4*d.*, and other items also, making together with the sum formerly disallowed the total of 103*l.* 6*s.* 5*d.*

On the 27th June an appeal was entered at the quarter sessions against the allowance of the justices, but was not heard owing to a preliminary objection to the notice of appeal.

The late overseers were afterwards summoned by their successors to appear before a meeting of magistrates on the 5th August to shew cause why they should not pay over the sum of 103*l.* 6*s.* 5*d.* The hearing of this summons was adjourned to the 30th September. On the 30th September the summons was attended before the defendants and several other justices, including the two justices who had allowed the accounts. The magistrates after hearing the case refused to make any order.

*Whately* and *J. Gray* shewed cause (a).

Sir *F. Pollock*, A. G. and *Whitmore* contra.

*Cur. adv. vult.*

(a) Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.

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Lord DENMAN C. J. delivered the judgment of the Court.—This was an application for a writ of mandamus, commanding certain justices to order the late overseers of West Bromwich to pay over to the present overseers the sum of 103*l.* 6*s.* 5*d.*, and if necessary to issue a distress warrant to levy the same.

At first it seemed as if this application had been founded on the statute 50 *Geo.* 3, c. 49, s. 1. By that section the overseers are directed within fourteen days after the expiration of their office to deliver their accounts to two justices at a special sessions, who are to examine them, and allow or disallow the various charges. It is then provided that in case such overseers shall neglect to pay their successors within fourteen days, “any sum or sums of money or arrearages which *on the examination and allowance of such account in manner aforesaid shall appear or be found to be due and owing* from such churchwardens and overseers or any of them, or remaining in their hands, it shall and may be lawful for the subsequent churchwardens and overseers by warrant from any two or more justices of the peace to levy all such sum or sums of money by distress and sale of the offender’s goods,” &c. It is plain from this section that the justices can only issue their warrant for such sum as shall have been found due on the examination and allowance of the overseers’ accounts by two or more justices at the special sessions within fourteen days of the overseers going out of office. Now it appears by the affidavits in the present case that the 103*l.* 6*s.* 5*d.* in question has not been so found to be due and owing. On the contrary, charges to that amount were allowed by the justices on their examination, as it is said improperly, but at all events were allowed, and no such sum is found to be due and owing. The justices therefore have no power to issue their warrant under 50 *Geo.* 3, c. 49, and of course this Court cannot command them to do what by law they have no power to do.

There is no other act previous to the Poor Law Act, 4 & 5 *Will.* 4, c. 76, which authorises the issuing of any

such warrant. The 43 *Eliz.* c. 2, s. 2, directs the overseers within four days after they go out of office to make and yield an account to two justices, and to pay the balance to their successors, but that act gives no remedy by distress, and applies only to the balance appearing by such account. The 17 *Geo.* 2, c. 38, s. 1, directs the overseers to deliver an account to their successors, verified on oath, within fourteen days, and to pay over the balance; and section 2 enables two justices to commit the overseer, who neglects to deliver such account or pay over the balance, till he does so. But this act gives no remedy by distress, and applies only to the balance appearing on the overseer's own account.

The 50 *Geo.* 3, c. 49, is the next act, on which we have already observed.

The last act, 4 & 5 *Will.* 4, c. 76, s. 47, directs the overseers to deliver, in addition to the annual account then by law required, accounts quarterly, or oftener if the Poor Law Commissioners shall so direct, to the auditor or person appointed by the Commissioners' rules to examine, audit, allow, or disallow such accounts, and to verify them on oath if required, and provides that all balances may be recovered in the same manner as penalties or forfeitures under that act. By section 99 penalties and forfeitures under that act are to be levied by warrant of two justices by distress and sale of the goods of the offender, and by section 101 power is given to summon the parties.

It should seem that an auditor was appointed by the Commissioners, that quarterly accounts were rendered to him, and that he disallowed the charges in question to the amount of 10*l.* 6*s.* 5*d.* in the month of January, 1843. He considered them to be contrary to the provisions of that act, or at variance with the rules, orders and regulations of the Commissioners, and, if so, no doubt they ought also to have been disallowed by the justices when the annual account was rendered to them, for the 89th

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section of the 4 & 5 *Will.* 4, c. 76, expressly provides that justices shall disallow such items.

The justices however considered the charges not to be contrary to the provisions of the act, nor to the rules, orders and regulations of the Commissioners, and allowed them as we have already observed. Against this allowance there was an appeal to the quarter sessions, which seems to be given by the 3d section of 50 *Geo.* 3, c. 49, and 17 *Geo.* 2, c. 38, s. 4, and on that appeal the allowance was confirmed. Notwithstanding this the auditor summoned the overseers before two justices, under section 101 of the 4 & 5 *Will.* 4, c. 76, to compel them to pay over the sums which he had so disallowed, and the justices and quarter sessions had so allowed. The justices refused, and we are now asked to issue a writ of mandamus, commanding them to make such order, and, if necessary, to issue their warrant under the 99th section of the same act.

This we cannot do unless we are prepared to say that the power of two justices, under the 50 *Geo.* 3, c. 49, to *allow* overseers' accounts, subject to appeal to the quarter sessions, has been wholly taken away, or, at all events, rendered wholly inoperative by the 47th section of the 4 & 5 *Will.* 4, c. 76, and has been transferred without appeal to the auditor appointed by the Poor Law Commissioners. The Attorney General in the course of his argument distinctly contended that the justices have no power to allow in the annual account any item which has been disallowed by the auditor in a quarterly account, although they might perhaps have power to disallow what the auditor had allowed.

The 47th section does not in terms authorise the auditor to disallow any items in the overseers' accounts, but it appears that a rule of the Poor Law Commissioners does, which, under section 42, has the authority of an act of parliament; so that here are apparently concurrent authorities, and in case of a conflict, as on the present occasion, it is difficult to say which was intended by the legislature to prevail.

The authority of the justices was well understood at the time of the passing 4 & 5 Will. 4, c. 76. The mode in which it was to be exercised was clearly laid down, and an appeal given as well to the overseers as to any other person who might be aggrieved. This authority is evidently intended to be preserved, for the 47th section directs the quarterly accounts to be rendered in addition to the annual account, thereby preserving that annual account, and by consequence all that by law ought to be or might be done upon it.

Then the 89th section further confirms the authority of the justices, for it directs them to disallow, not what the auditor shall already have disallowed, but all charges which shall be contrary to the provisions of the act, or to the rules, orders and regulations of the Commissioners; leaving it to them to determine what charges are so contrary, and not mentioning the authority of the auditor. And this section contains a remarkable proviso—"Provided always, that no allowance by any justice shall exonerate or discharge such overseer or guardian from any penalty or legal proceeding to which he may have rendered himself liable by having acted contrary to the rules, orders and regulations of the said Commissioners or to the provisions of this act." As if the legislature contemplated that justices, either from ignorance of the rules, orders and regulations of the Poor Law Commissioners, or from misinterpreting them or the provisions of this act, might happen to allow improper charges, and intended to guard against the shielding overseers from penalties, though the charges might stand good as items of their accounts by reason of the allowance of the justices. Seeing then that the authority of the justices is evidently intended to be preserved, that no provision is made by which that authority is rendered subordinate to that of the auditor, nor any provision by which the exercise of such authority as the Commissioners may think fit to give to an auditor can be reviewed by way of appeal; we are of opinion that whatever effect may have

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been intended to be given to the examination of overseers' accounts by an auditor, the ultimate allowance or disallowance of them is still vested in the justices, subject to appeal to the sessions.

We were reminded that by statute 6 & 7 *Vict.* c. 67, s. 3, all persons are protected from action in respect of any thing done in obedience to a peremptory mandamus, and were therefore asked to let the writ go, if there be any doubt, inasmuch as the justices by making a return, even if it should be bad, might induce a *peremptory* mandamus, and so protect themselves from danger. But we do not feel that there is really any doubt in the case, nor do we think that we ought to hold out to justices that they should make a return to a writ of mandamus, instead of obeying it, for the sake of obtaining the protection of a peremptory mandamus under the late act.

This rule must be discharged.

Rule discharged.

The QUEEN v. Lord HASTINGS and another (*a*).

A party charged as putative father appeared at the petty session in pursuance of notice, and procured the application to be dismissed, on the ground that the notice was not signed by the majority of the parish officers.

*GUNNING*, in Easter Term last, obtained a rule to shew cause why a mandamus should not issue to the defendants, commanding them to make an order upon the guardians of the poor of the Aylsham Union, in the county of Norfolk, to pay to one *Shepherd* the costs incurred by him in resisting an application made by the guardians of the poor of the said union to the defendants, at a petty session, for an order upon him to reimburse the said union for the maintenance of a bastard child, upon the hearing of which application the defendants did not think fit to make any order thereon, but dismissed the same.

He afterwards applied for a mandamus to the petty session to order payment of costs to him, on the ground that there had been a hearing of the application, within 4 & 5 *Will.* 4, c. 76, s. 73.

(*a*) Decided in Trinity Term, 1844, (June 3).

*Held*, that he was not entitled to costs as there had been no "hearing."

It appeared that in March last *Shepherd* had been served with notice, purporting to be given on behalf of the Aylsham Union, of an intended application to a petty session for an order of maintenance upon him as the putative father of a bastard. *Shepherd* appeared at the petty session in pursuance of the notice. The defendants, before whom the case was brought, dismissed the application, on an objection taken by the attorney for *Shepherd*, that the notice was not proved to have been signed by a majority of the guardians of the union.

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*Erle* now shewed cause. The statutes 4 & 5 *Will.* 4, c. 76, s. 73, and 2 & 3 *Vict.* c. 85, s. 1, do not allow costs to be given to the putative father where a bastardy application is dismissed, unless there has been a "hearing;" and section 73 of the first-mentioned statute also enacts, that no "such application shall be heard" unless notice shall have been given. In this case there was no hearing, and could be no hearing for want of notice. *Shepherd* himself took the objection and prevented the hearing. The hearing is a condition precedent to the right to costs, and this rule must be discharged. *Reg. v. Recorder of Exeter(a)* is distinguishable. There the case had been removed from the petty to the quarter sessions; and the parties who had applied for the order chose to contend before the sessions that they were not the proper parties to apply, and procured the dismissal of the application on that ground.

*Gunning* contra. The appearance of the party charged as the putative father to make the objection was a hearing. There is equally a hearing whether a case is disposed of on the form or the merits. In *Rex v. Cottingham(b)* it was held that the sessions have power to grant costs under stat. 8 & 9 *Will.* 3, c. 30, s. 3, in all cases in which an appeal has been entered and determined, whether the determination be upon the merits or for defect of form. In *Reg. v.*

(a) 3 G. & D. 167.

(b) 4 N. & M. 215.

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*Stamper* (a), the overseers of a parish had given notice of an intended application against a person as putative father, and, according to a rule of the sessions, had entered their intended application in a book kept for that purpose, but did not further appear to pray any order. The case was called on, and the defendant appeared. It was held that the calling on the case and appearance of the defendant was a hearing, and that therefore the sessions had jurisdiction to award costs to the party charged as the putative father. *Reg. v. Recorder of Exeter* (b) is precisely the same as the present case. There the putative father had procured the dismissal of the application, on the ground that it was not made by the proper parties, and this Court said that there had been a hearing, and that he was entitled to costs. Notice was given in the present case, but it was a bad notice, and therefore tantamount to no notice.

LORD DENMAN C. J.—This party has no right to costs. He could only be entitled to them if there had been a hearing. There was no hearing in this case, and could be none, as proper notice of the application had not been given. This party has himself prevented the hearing, and now comes to this Court and says there has been a hearing. But I ground my judgment on the words of the statute.

PATTESON J.—I am of the same opinion. In *Reg. v. Stamper* (a) there was no objection that notice had not been given; and in *Reg. v. Recorder of Exeter* (b) the objection was to the application as having been made by wrong parties.

WILLIAMS J.—The sessions have exercised a sound discretion, which we should be much disinclined to review, and no cases compel us to do so. This party contends first of all that the case cannot be heard because he has

(a) 4 P. & D. 539.

(b) 3 G. & D. 167.

had no notice, and succeeds in that objection; and now he says he has been heard, and asks for costs.

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WIGHTMAN J.—The party objected to the notice; the notice could not be proved. That was equivalent to no notice. On that objection he succeeded in preventing the hearing of the case, and now he says he has been heard.

Rule discharged.

The QUEEN v. The Inhabitants of STOKE BLISS (a).

*W. H. COOKE*, on a former day in this term, obtained a rule to shew cause why an order made at the Staffordshire sessions in January last, and removed by certiorari into this Court, should not be quashed.

On the 29th September last, an order was made for the removal of a pauper from the parish of Kingswinford, in the county of Stafford, to the said parish of Stoke Bliss, in the county of Hereford. Notice of appeal against this order was given in the following month, and on the 18th December a statement was served of the grounds of the appeal, accompanied by notice that the parish officers of Stoke Bliss intended to commence and prosecute their appeal at the next January sessions for the county of Stafford.

The January quarter sessions for the county of Stafford were held on the 2d of that month. By the practice of those sessions, appeals are not taken until the Thursday, the third day of the sessions, and notice of countermand of any appeal is required to be given not later than the Monday before the sessions.

(a) Decided in Trinity Term, 1844, (June 5).

ment of the costs incurred by the parish in preparing to sustain the order. *Held*, that the order was not divisible; and, as the sessions had confirmed the order of removal, which they had not jurisdiction to do, no appeal having been actually entered, the order of sessions was not good even for so much as related to the costs.

After service of notice and grounds of appeal against an order of removal, and of notice of intention to try at the next sessions, a countermand of the notice of appeal and of notice of trial was served, but not in time, according to the practice of the sessions. No appeal was actually entered. The parish which had obtained the order applied for costs, under stat. 8 & 9 Will. 3, c. 30, s. 3.

The sessions made an order confirming the order of removal, and further ordering pay-

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On Tuesday, the 2d January, countermand was served of the notice of appeal, on the ground of the absence of a material witness ; and it was stated that fresh notice of appeal would be given, if the pauper should be actually removed, and an offer was made to give information as to the true place of the pauper's settlement.

On Thursday, the 4th January, application was made to the sessions, by the parish officers of Kingswinford, for costs incurred by them in preparing to try the appeal, and upon proof of service upon them of the above notice of appeal, and statement of the grounds thereof, the sessions made the order, which was the subject of the present rule.

The order in question ran thus :—


“ *Stoke Bliss* } Upon the motion of *A. B.*, of counsel  
 v. } for the churchwardens and overseers of the  
*Kingswinford.* } poor of the parish of Kingswinford, in the  
 county of Stafford, and upon proof of notice of appeal,  
 with a statement in writing of the grounds of such appeal,  
 signed by the churchwardens and overseers of the poor of  
 the parish of Stoke Bliss, in the county of Hereford, having  
 been given to the said churchwardens and overseers of the  
 poor of the said parish of Kingswinford, fourteen days  
 previous to the sessions now holden, against a certain  
 order, &c., for the removal of, &c. ; and no one appearing  
 on behalf of the appellants to prosecute their appeal, it is  
 ordered, that the said order made by the said justices be  
 and the same is hereby confirmed ; and it is further ordered,  
 that the churchwardens and overseers of the parish of Stoke  
 Bliss do and shall forthwith pay to the churchwardens and  
 overseers of the parish of Kingswinford the sum of 15*l.* 10*s.*,  
 the costs and charges which they have incurred and been  
 put to in attending the Court this day to support the said  
 order.”

No appeal had been entered.

*Whitmore* and *R. Allen* now shewed cause, and contended, that although the sessions had no jurisdiction to confirm the

order of removal, as no appeal had been actually entered, yet that they had jurisdiction to award costs under stat. 8 & 9 *Will.* 3, c. 30, s. 30, upon proof that notice of appeal had been given, and that the order was divisible, inasmuch as the rest of the order was merely ancillary to the award of costs, and that it was good for so much as related to the costs, though bad for the residue.

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*W. H. Cooke* contra. As no appeal was entered, the officers of Kingswinford had no right to go to the sessions at all, and the sessions had no right to make the order either for confirmation of the order or for costs. Since the passing of the Poor Law Amendment Act there are two periods for appealing, the one on service of the order of removal, and the other on the actual removal of the pauper. Any costs incurred by the parish of Kingswinford in consequence of the notice of appeal were costs in the cause, and would be disposed of on the final prosecution of the appeal after actual removal, whereas, if the interlocutory order may be made for costs *pendente lite*, the parish against which the order of removal is issued will be saddled with costs in respect of a pauper who, it may ultimately appear, belongs to a different parish. [*Patteson J.* Suppose there is no appeal after actual removal, how are the costs to be got then?] Application for costs may be made under the statute of *Will.* 3 to the next sessions after the second period of appeal has expired; and the application may then be fairly granted, as the parish so neglecting to appeal will then have admitted its liability to maintain the pauper. [*Coleridge J.* Such costs are quite independent of the result of the appeal; if the parish officers may go to the sessions after the second period of appeal has run out, it does not follow that they must.]

Lord DENMAN C. J.—It seems that the parish officers of Stoke Bliss gave notice of appeal, and afterwards countermanded it, but not in due time. They also gave fresh



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notice of their intention to appeal, if the pauper should be removed, and intimated that they had good ground for resisting the order. When we look at the order of sessions and the other documents, we cannot but see that the costs are but ancillary to the judgment confirming the order of removal, which was a judgment the sessions had no right to give. The order cannot be sustained.

PATTESON J.—It is unfortunate, but the sessions have clearly confirmed the order of removal, which they had no jurisdiction to do, as no appeal was entered. The order for costs cannot be separated from the order of confirmation. I am far from saying that if the sessions had confined the order to the costs of the day it would not do; I do not think the Poor Law Amendment Act has in this respect done away with the provisions of the statute of *William the Third*.

WILLIAMS J.—If that were so, a party would be remediless in case of a vexatious countermand. I am not at all sorry to decide this case upon the documents themselves, which are much safer to go upon than affidavits. The order is an order of confirmation of the order of removal, and the order for costs depends upon the order of confirmation.

COLERIDGE J.—I am of the same opinion. I think the right time was taken to apply for costs; and I do not say that an order of this sort might not be in some case severable. This is a question of construction, and perhaps the best way is not to look at the affidavits. Looking at the order of sessions alone, I must take it that they thought they had jurisdiction to confirm the order, and that they granted the costs upon confirmation of the order. The order for costs is ancillary to the rest of the order, and cannot be sustained.

Rule absolute.

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## ARMITAGE v. HAYLEY.

Tuesday,  
June 13th.

**CASE** for negligent driving. Plea, not guilty, and issue thereon.

At the trial before *Parke B.*, at York, at the spring assizes, 1843, it appeared that the defendant's servant was driving an omnibus, and ran against the plaintiff, who was riding, whereby the mare of the plaintiff was thrown down and the plaintiff bruised, and his thigh-bone broken. There was contradictory evidence as to the cause of the accident, whether from the negligent driving of the defendant's servant, or the restiveness of the plaintiff's mare. Verdict for plaintiff, damages one farthing.

*Dundas*, in the Easter Term following, obtained a rule for a new trial, unless the defendant would consent to have the damages increased, against which

In case for negligent driving, with a plea of not guilty, where the jury found for the plaintiff with one farthing damages, although it was proved that his leg had been broken by the accident, the Court granted a new trial on payment of costs. The rule that the Court will not grant a new trial merely on account of the smallness of the damages does not extend to the case of a severe personal injury.

*W. H. Watson* and *Pashley* shewed cause. The Court will never grant a new trial merely on account of the smallness of damages in an action of tort: *Randall v. Hayward*(a). That was an action for slander. *Tindal C. J.* there says, "I think a more complete measure of justice would have been attained if the jury had given higher damages, but the Court never grants a new trial because the damages are low." *Hayward v. Newton*(b), *Barker v. Dixie*(c), are to the same effect. In the latter case the reason of the rule is given, that a verdict for the plaintiff, with small damages, is not a false verdict, as a verdict for the defendant would be, because as they have found rightly for the plaintiff no attaint would lie, and new trials came in in the place only of attainments as a more expeditious and easy remedy. *Mauricet v. Brooknock*(d) was a writ of inquiry in an action on the case for maliciously suing out a

(a) 5 Bing. N. C. 424.

(c) Str. 1051.

(b) Str. 940.

(d) Doug. 509.

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commission of bankruptcy against the plaintiff, and the jury having found 5s. damages only, the Court refused to interfere. (They also cited *Viner's Abridg. Trial, Y. g.*) The jury here must have thought both parties to blame, and the verdict for one farthing was in mercy to the plaintiff.

*Dundas* (with whom was *J. Addison*) contra. The verdict is absurd. A farthing damages for a broken thigh.

Lord DENMAN C. J.—The damages found by the jury are in truth no damages at all. The rule must be made absolute for a new trial, on payment of costs. The rule that the Court will not grant a new trial merely on account of the smallness of the damages, must be considered as applying only to actions of slander. It certainly does not extend to cases where the plaintiff has received a violent personal injury. His Lordship referred to the case of *Cook v. Beal*(a).

The rest of the Court concurring(b).

Rule absolute.

(a) 1 Ld. Raym. 176.

(b) The rule appears to be, that if damages are given at nisi prius in an action where damages are the principal, and the Court can have no certain knowledge of the cause, neither by the record nor by other matter apparent, they can neither mitigate nor increase the damages; 1 *Roll. Abr.* 571, *Damages, K.* Thus "in an action on the case for calling the plaintiff 'bankrupt,' and the general issue pleaded, the jury found for the plaintiff with 150*l.* damages, and

because it was great damages the Court at first reduced them to 50*l.* But afterwards, upon great advice, they revoked that, and would not change the course of the law, and resolved to leave such matters of fact to be found by the jury, who better knew the quality of persons and their estates, and the damage they may sustain by such disgrace. But it is otherwise where the action is grounded upon a cause which can appear to the view of the Court, as in mayhem, &c., and so they give judgment for the 150*l.*

according to the verdict:" *Hawkins v. Sciat*, Palmer, 314. See also *Roll. Abr. Damages*, K. pl. 2—7 inclusive. So that where the declaration is for a personal injury, and charges a mayhem or a battery, and the particular injury complained of is described in the declaration, the Court upon view will increase the damages; *Mallet v. Ferrers*, 1 Leon. 139; *Austin v. Hilliers*, Hardres, 408; *Brown v. Seymour*, 2 Wils. 5; *Cook v. Beal*, 1 Ld. Raym. 176. And it would seem that there is a distinction where the personal injury complained of is not occasioned directly by the plaintiff, but is only the consequence of his wrongful act, as in trespass, for that the defendant made an assault upon and maltreated the plaintiff's wife, and struck the horse upon which the wife was riding, so that the wife was thrown upon the ground and another horse trod upon her, whereby she lost the use of three of her fingers; and upon not guilty, and verdict for plaintiff, with 8*l.* damages, it was moved that the damages be increased on the view of the wife and hearing of the surgeon. But the Court would not hear it, because it was doubtful

whether they would be increased on the view, inasmuch as no mayhem or wounding was made here directly by the party; but it is rather by accident, to wit, the coming of the other horse, the which how he came, or if the wife could have avoided him, is matter of evidence, and so they denied to increase the damages; *Burford and wife v. Dadwell*, Sid. 433; *S. C.* 1 Mod. 25. See also *Angell v. Shatterton*, Sid. 108. But perhaps it may be doubtful whether in these two cases the Court did any more than refuse to exercise their discretion; *Brown v. Seymour*, 1 Wils. 5. With regard to proceedings after interlocutory judgment, it is said that it is the function of the Court to assess the damages, and that the proceeding by writ of inquiry is only an inquest of office to inform the conscience of the Court; 2 Will. Saund. 107, note 2; *Bruce v. Rawlins*, 3 Wils. 61; *Goodwin v. Wilsher*, Yelv. 151; *S. C.* Brownlow, 214; and that therefore the Court may increase the damages; 1 *Roll. Ab. Damages*, L. p. 573; but it is, perhaps, doubtful whether this can be done except within the limits above-mentioned.

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## FISHER v. WALTHAM.

Plaintiff  
wagered with  
defendant  
that defend-  
ant would pass  
his examina-  
tion as attor-  
ney; defend-  
ant passed.  
Assumpsit  
being brought  
on the wager,  
*Held*, on de-  
murrer to the  
declaration,  
that the wager  
was void, in-  
asmuch as it  
was of the  
nature of a  
bubble bet,  
defendant  
having it  
in his power  
to win if he  
pleased.

THIS was an action of assumpsit on a wager. The plaintiff had bet the defendeunt eight bottles of wine that he the defendant would pass his examination as an attorney of this Court. The defendant passed his examination, and refused to pay. Demurrer on the ground that the contract appeared on the face of it to be illegal.

*Wordsworth* for the defendant. The wager is void as against public policy: *Gilbert v. Sykes* (a). Also as being respecting the proceedings of a court of justice: *Evans v. Jones* (b); for the examination of persons seeking to pass as attorneys, under 2 *Geo. 2*, c. 23, s. 6, and the rule of Hil T. 6 *Will. 4*, is by act of the Court. [Lord *Denman* C. J. Is there not another objection? It seems to be of the character of a bubble bet. The defendant might have won, if he pleased, by not passing his examination."]

*Martin* contra. The examiners act by a specific authority of their own, nor is their examination in any sense a proceeding of a court of justice. *Jones v. Randall* (c) is in point.

LORD DENMAN C. J.—I think the objection, that this is a bubble bet, has not been answered. The defendant had the event in his own command.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Judgment for defendant.

(a) 16 East, 150.

(b) 5 M. & W. 77.

(c) Cowp. 37.

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The QUEEN v. The Mayor, Aldermen and Burgesses  
of LEEDS.

Wednesday,  
May 31st.

THIS was a certiorari to bring up and quash two orders of the town council of Leeds; the one for payment of the sum of 27*l.* 13*s.* 6*d.*, expenses incurred in obtaining the opinion of counsel and also a journey undertaken by the town-clerk to London respecting the election of councillors for the Mill Wall Ward, the other, of 54*l.* 1*s.* 4*d.*; the amount of the bill of costs of solicitors, being a firm of which the town-clerk was a member, for opposing a rule for a mandamus to receive and count the vote of *Radford Potts* among the councillors of the borough.

Sir *W. W. Follett* S. G., had obtained a rule nisi on affidavits setting out that a question had arisen at an election for the office of councillor for the Mill Hill Ward in November, 1840, whether a Mr. *Potts*, or another gentleman, had the majority of votes, which was decided by the mayor against Mr. *Potts*. Mr. *Potts* had obtained a rule nisi for a mandamus. The council passed a resolution, in Jan. 1841, that cause should be shewn against this rule, which was done accordingly; but the rule was made absolute in Hil. T. 1841. On Feb. 2, 1842, the council passed a resolution directing the finance committee to include the 54*l.* 1*s.* 4*d.* in their report; and on the 4th May following the two orders were made, which it was now sought to quash.

Sir *F. Pollock* A. G. and *J. Addison* shewed cause, and cited *Rex v. The Commissioners of Sewers for the Tower Hamlets* (a), *Rex v. The Inhabitants of Essex* (b); and contended that the principle of *Rex v. The Mayor, &c. of*

(a) 1 B. &amp; Ad. 232.

(b) 4 T. R. 591.

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*Bridgewater* (a) must be qualified, as cases might arise where the existence or valuable rights of the corporate body might be perilled by proceedings directed against individual members.

Sir *W. W. Follett* S. G. and *R. Hall*, *contra*, were not called on.

LORD DENMAN C. J.—Undoubtedly where such questions as are suggested are raised by informations or writs of mandamus directed against individuals, it is no misapplication of the borough fund to defend them; which was the ground of the decision of Lord *Cottenham* C. in *The Attorney-General v. The Mayor of Norwich* (b), on appeal from the Master of the Rolls (c). But no such questions arose in the present instance, and I am of opinion that this was clearly a misapplication of the borough fund.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule absolute.

(a) 6 A. & E. 339; 2 P. & D. 558.

(b) 2 Myl. & Cr. 416.

(c) 1 Keene, 700; see also *Holdsworth v. The Mayor, &c. of Dartmouth*, before the Lord Chancellor, in Feb. 1844, 8 Jurist, 741.

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## TRINITY VACATION.

PENNELL and others, Assignees of NEWTON, a Bankrupt, v.

ATTENBOROUGH.


Thursday,  
June 29<sup>th</sup>.TROVER by the plaintiffs, as assignees of one *Alexander Levi Newton*.

Plea, as to parcel of the goods, payment into Court of the sum of 6*l.*, which the plaintiffs took out of Court, and proceeded no further in respect of such parcel. And as to the residue, that the plaintiffs, as assignees, as mentioned in the declaration, were not lawfully possessed of the said goods and chattels in the declaration mentioned, and upon which last mentioned plea issue was joined. The cause was tried before Lord *Denman* C. J. at the London Sittings after Trinity Term last, when a verdict was found for the plaintiffs for 1200*l.* damages, subject to be reduced to 40*s.* on the goods sought to be recovered being given up to the plaintiffs, if there should be judgment for them; and subject to the opinion of the Court upon a special case.

Advances made by a pawnbroker on the deposit of goods, in sums exceeding 10*l.*, and at pawnbroker's interest, are not void for non-compliance with the provisions of the Pawnbrokers' Act, stat 39 & 40 Geo. 3, c. 99, the 6th section of which only extends to loans of money in sums not exceeding 10*l.* Loans of money in sums exceeding 10*l.*, and at usurious interest, secured by the deposit of goods, are protected by stat. 2 & 3 Vict. c. 37.

The case stated that *Newton*, before and at the time of his bankruptcy, was a merchant and general dealer, resident and carrying on business in Bury Street, St. Mary Axe, who amongst other things had dealings in plate and jewellery. That in February or March, 1841, he became embarrassed in his circumstances, and on or about the 14th of June committed an act of bankruptcy, upon which a fiat issued against him on the 22nd day of June, 1841, under which the plaintiffs were duly appointed assignees. That before *Newton* became bankrupt, he resorted to the pledging of divers of his goods constituting his stock in trade, particularly watches, jewellery and diamonds, and on the evening of Saturday the 10th of April, 1841, one *Spaul*, then being his servant, and by his direction, carried out several parcels



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of silver forks and spoons for the purpose of pawning each parcel for the sum of 10*l.* That he took the said parcels to the shop of the defendant, situate in Crown Street, Finsbury, where the defendant carried on the business of a pawnbroker, and offered to *John Pawley*, then being the shopman of the defendant, one of the said parcels of forks and spoons, and asked him to advance 10*l.* upon the pledge and security of that parcel. That the said *Pawley* thereupon asked the said *Spaul* if he wanted any more money, to which the said *Spaul* replied that he did want more money, but thought it was not customary for a pawnbroker to lend more than 10*l.* to one person in one day, to which the said *Pawley* answered that he would lend as much on the same kind of security as the said *Spaul* wished.

That thereupon *Spaul* went into the private parlour of the defendant's house, which adjoined the shop, and left with *Pawley* three packets of spoons and forks without receiving any advance of money, and departed from the defendant's house for the purpose of procuring more plate from the said *Newton*. That on his return, the said *Pawley* received the said additional quantity of plate, and advanced to him 115*l.* upon the security of all the plate so brought to the defendant's house by the said *Spaul* according to the directions of the said *Alexander Levi Newton*. That the said *Pawley* then handed to the said *Spaul* for his signature a form in a book, partly printed, but which the said *Pawley* had filled up in the words, figures and letters following, that is to say, "31, Crown Street, Finsbury. I have this day deposited with Mr. *R. Attenborough* the following goods, viz., (here followed a list of the articles,) to be held by him as a security for the payment of the sum of 115*l.*, this day lent by him to me, together with interest thereon from the date hereof after the rate of 15 per cent. per annum, till payment, and should such sum of 115*l.* and interest not be paid by me to the said *R. Attenborough* by the 10th day of October next, I do hereby authorise and empower the said *R. Attenborough*, his executors, administrators or

assigns, to sell or dispose of the said articles, or any of them, either by public sale or private contract, and out of the proceeds thereof to pay the expenses of and incidental to such sale, and retain the said sum of 115*l.* and interest thereon after the rate aforesaid, until the time of such retainer, or so much and such parts thereof respectively as shall remain unpaid. Dated this 10th day of April, 1841. Signed *John Spaul*, 32, Cumberland Street, Hackney Road."

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That the said *Pawley* also delivered to the said *Spaul* a paper writing in the following form: "Lent by *Richard Attenborough*, of 31, Crown Street, Finsbury, to Mr. *John Spaul*, of 32, Cumberland Street, Hackney Road, the sum of 115*l.* on following articles, viz. (enumerating the articles), for six months from this date, at the rate of 15 per cent. per annum. 10th April 1841." It appeared from the case that there were various other dealings afterwards and before the commencement of this action between the said *Newton* and the defendant of exactly the same nature, upon each of which occasions an agreement was signed similar to the agreement set forth, and a like memorandum given by *Pawley* to *Spaul*, and that the sum of 974*l.* 10*s.* was upon the whole advanced by the said defendant to the said *Newton* upon the security of the articles deposited, some of which were new, and others of them secondhand, and some also of which had never been paid for by the said *Newton*, but had been sent in to him upon approbation, and were sent by him to raise money upon as aforesaid on the following day. It also appeared that the defendant did not make entries in any book upon any of the dealings above mentioned, pursuant to the provisions of s. 6 of 39 & 40 Geo. 3, c. 99, nor did he make out or deliver to the said *Spaul* any duplicate or memorandum in writing in conformity with the enactments of that section, or comply with the requisites thereof in any other particular, but that the agreements so signed as above mentioned by *Spaul* were kept or entered in a book of the defendant called the High Book, that is to say, a book containing blank forms

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of such agreements, which had been used by the defendant for about two years previously to the commencement of the action in all cases where the defendant or his shopman *Pawley* advanced or lent money beyond the amount of 10*l.* upon the deposit or pledge of goods. It also appeared that the house of the defendant, of which the shop formed a part, was situate at the corner of Crown Street, Finsbury, and Long Alley, and numbered 31, Crown Street, Finsbury, and No. 108, Long Alley, and that the defendant also occupied the house No. 109, Long Alley, adjoining to and communicating internally with No. 108 and with the said shop; that there was a door into the shop in Crown Street, Finsbury, over which there was written "*Richard Attenborough, Licensed Pawnbroker,*" according to the Pawnbrokers' Act, and another door into the shop in Long Alley, over which was a similar inscription. That to the house No. 109 there was an outer and an inner door, and on the outer door a brass plate with the name "*Attenborough*" thereon, and that this inner door had a brass plate with the words engraved, "Private Office, Money advanced on the Deposit of Goods," and that the rooms in the upper part of both the houses, as well as the back part of the premises, were used and occupied for the purpose of depositing and preserving articles pledged with the defendant as a pawnbroker. That on the first of the above mentioned occasions, when *Spaul* went into the said shop of the defendant, he entered the shop from the entrance into Crown Street, and when he returned to the defendant's house for the second time on the same evening with the additional quantity of plate, and upon which occasion the defendant advanced the 115*l.* as above mentioned, that he went in at the private door of the defendant in Long Alley, and that on every subsequent occasion, when he went to the defendant to obtain a loan of money upon the said goods of the said *Newton* as aforesaid, he entered the defendant's premises at the said private door, and on each of these occasions was conducted into and remained in the private room of the defendant at the back of the said shop, and on each of these occasions was

directed by the defendant that he could upon all future occasions of visiting the defendant for the same purpose enter at the same private door.

The question for the opinion of the Court was, whether the plaintiffs, as assignees, are entitled to recover the goods, or any part of them, so pledged as aforesaid. And, if the Court should be of opinion that they are so entitled, the verdict was to stand, or to be reduced to 40s. on a return to the plaintiffs of such goods; but, if the Court should be of opinion that they are not so entitled, the verdict was to be set aside, and a verdict entered for the defendant.

*M. Chambers* for the plaintiffs (a). The loans were made by the defendant in his character of pawnbroker. This was therefore a taking of goods by the defendant by way of pawn or pledge, within the 6th section of the Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99, and the requisites of that section should have been complied with, in order to make the transaction valid. But it is admitted by the case that this has not been done. The contracts are therefore all void, and the assignees are entitled to recover in trover: *Fergusson v. Norman* (b). The only difference between that case and the present is, that there the sums advanced were all under 10l., and it is assumed that wherever the sum lent on pledge exceeds 10l., the case is altogether out of the provisions of the act. But this is not so; the rate of profit which pawnbrokers are permitted to take is fixed by the 2d section of the act, and it is there stated to be in lieu and as a full satisfaction for all interest due and charges for warehouse room. The provisions of that section extend to pledges on which sums of the several amounts there mentioned, but not exceeding 10l., have been lent; but the limit of 10l. was intended as a privilege to the pawnbroker, and does not dispense with the pawnbroker's obligation to comply with the provisions of the 6th section, where the sum

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(a) During the Term (June 6), before Lord Denman C. J., *Patte-*  
*son, Williams and Coleridge* Js.  
(b) 5 Bing. N. C. 76.

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advanced by him on pawn exceeds 10*l*. The 30th section provides, "that nothing in that act contained shall extend to any person who shall lend money to any person upon pawn or pledge at the rate of 5*l*. per cent. per annum interest, without taking any further or greater profit for the loan or forbearance of such money lent." Therefore, where a greater profit than 5*l*. per cent. is taken by a pawnbroker upon a loan of whatever amount upon pawn or pledge, the provisions of the statute apply. If it had been the intention of the legislature to limit the act to loans of sums not exceeding 10*l*., there would have been an express provision to that effect. But in many sections of the act there is no limit to the sum expressed. (He referred to sections 10, 11, 12 and 13 of the act in support of this.) There is therefore nothing to shew that the provisions of section 6 are to be confined to loans not exceeding 10*l*. But it clearly appears from the prior statutes that similar provisions were in force when the acts contained no limit to the sum to be advanced. The first statute is the 1 *Jac.* 1, c. 21, which is a key to all the rest; the term pawnbroker was then unknown, and the party lending money on pawn of goods was termed a broker simply. The object of the legislature in this statute and the subsequent act, the 30 *Geo.* 2, c. 24, was to facilitate the recovery of stolen property, and to prevent fraud by parties pledging goods to which they had no title. The 7th section of the former statute, with this view, compels the broker to declare, upon demand by the owners of goods purloined or stolen, whether the same have come to his hands, and if in his possession to shew the same, and how and by what means he had them. And the 4th section of the latter statute requires the pawnbroker to make entries of goods pawned, and to give duplicates to the parties pawning. But neither statute contains any limit as to the amount to be lent on pledge; it is evident, therefore, that the provisions of these statutes applied to all loans on the deposit of goods by way of pledge to whatever amount. Prior to the passing of the next act, statute

24 Geo. 3, c. 42, pawnbrokers could not take more than the ordinary legal interest upon their advances; but, besides the interest, they were in the habit of charging a sum for warehouse room, which was either matter of agreement at the time of the loan, or else was such sum as a jury, upon action brought for recovery of the pledge, on tender of the principal and interest and warehouse room, should think reasonable. But it appears from the preamble to this statute that juries were in the habit of giving sums so inadequate to the real expenses, that business could not be carried on agreeably to such verdicts with profit to the pawnbroker. The statute therefore enabled the pawnbroker to take large interest, on the loans of small sums of money, as a boon, but it did not free him from the obligation of complying with the requisition of the prior statutes in all cases where he had lent money on the pledge of goods, because the mischief intended to be provided against, namely, the raising money on goods stolen, or pledged without the authority of the owners, would be as likely to occur in the case of advances exceeding 10*l.* as of smaller loans. In the present case, the goods were pledged in the name of *Spaul*, not of the real owner, and part of them had been only sent to the bankrupt for approbation, and never paid for, so that the very mischief contemplated by the statute has taken place here.

Sir *W. W. Follett* S. G. *contra*. The question turns upon the true construction of stat. 2 & 3 *Vict.* c. 37. The dealings between the defendant and the bankrupt were contracts for the loan or forbearance of money above the sum of 10*l.*, within the meaning of the 1st section of that statute, and are therefore valid notwithstanding the rate of interest taken exceeded 5*l.* per cent. There is nothing in the particular facts of this case to take it out of the operation of that statute. The mere fact of the defendant being a pawnbroker, and that the loan was made on the deposit of goods by way of pledge, can make no difference. It

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differs totally from that class of cases where the advances have been split into sums of 10*l.*, and it has been a question for the jury, whether this was so done colourably for the purposes of obtaining pawnbroker's interest. But here the advances were all far above the limit to which the provisions of the Pawnbrokers' Act apply. The acts which have been referred to on the other side are not now in force; of these the important one is statute 30 *Geo.* 2, c. 24. The provisions with respect to duplicates in that statute are repealed, and all its provisions are applicable to advances in small sums, and the preamble of stat. 24 *Geo.* 3, c. 42, recites it as applying to loans not exceeding 10*l.* This and the succeeding statutes enable pawnbrokers to take higher interest than 5*l.* per cent. upon advances not exceeding 10*l.*, but subjects them to certain regulations. Looking at the 6th section of stat. 39 & 40 *Geo.* 3, in reference to the 2 & 3 *Vict.* c. 37, it appears that persons lending money on the deposit of goods by way of pledge in sums not exceeding 10*l.*, and taking the interest allowed by the act, are bound to comply with its provisions, but that these do not apply if legal interest only is taken, whatever the amount advanced. Therefore, before the statute of the 2 & 3 *Vict.* c. 37, advances above 10*l.* were not within the Pawnbrokers' Act, if legal interest only were taken, and otherwise void altogether; and since the statute such advances are not within the Pawnbrokers' Act, although usurious interest be taken. Therefore every advance of above 10*l.* upon a deposit of goods by way of pledge is now without the Pawnbrokers' Act, whatever rate of interest may be taken; but the statute 2 & 3 *Vict.* c. 37, leaves the case of the advance of money on pledges in sums not exceeding 10*l.* to be dealt with by the law as it stood before; if usurious interest is taken, the provisions of the Pawnbrokers' Act must be complied with. The word profit in the 2d section of the Pawnbrokers' Act means something beyond interest for money, and all the sections of the act shew this to be confined to advances not exceeding 10*l.* Thus section 17 au-

thorises the sale of pledges deemed to be forfeited, and enacts that *all* goods and chattels which shall be pawned or pledged shall be deemed to be forfeited, and may be sold at the expiration of a year. It then directs that certain regulations shall be observed on the sale of pledges on which a sum above 10s. but not exceeding 10*l.* has been advanced, but is silent as to the rest. If the construction contended for on the other side is correct, these regulations would not apply to the case of the sale of pledges, on which a larger sum than 10*l.* had been advanced. Again, the words "principal money and profit aforesaid," in the 20th section, are clearly only applicable to the same expression in the 2d section, and must be confined to the profit allowed to be taken upon advances not exceeding 10*l.* In *Fergusson v. Norman* (a) the defendant claimed to retain the goods on pledge for securing more than legal interest, without having complied with the provisions of the Pawnbrokers' Act. *Coltman J.* there says, "The defendant must be considered to have received the goods as a pawnbroker. Now a pawnbroker is a person who lends money on usurious interest and on interest that *primâ facie* would be illegal." But taking more than 5*l.* per cent. is not now an illegal act; nor since the statute of 2 & 3 *Vict.* c. 37, is a contract to pay 15*l.* per cent. on a loan of more than 10*l.* *primâ facie* illegal; nor is it requisite to protect such a transaction by shewing that the party to it was a pawnbroker, and that he had complied with the Pawnbrokers' Act, and unless the contract is invalid the defendant is clearly entitled to the possession of goods. [*Patteson J.* referred to the case of *Tregoning v. Attenborough* (a).] There the contract was illegal.

*M. Chambers* in reply. The provisions in the 24 *Geo.* 3, c. 42, and the subsequent acts which regulate the rates of profit to be taken on advances by pawnbrokers not exceeding 10*l.*, refer only to those cases where the parties pledging

(a) 5 Bing. N. S. 76.

(b) 7 Bing. 97.



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had a summary remedy, under the 30 *Geo.* 2, c. 24, s. 10, for the redemption of their goods, on payment of the principal, interest and warehouse room, but the 6th section extends to all advances by a person assuming to act as a pawnbroker. The 1st section of the 2 & 3 *Vict.* c. 37, does not apply to pawnbrokers, and the proviso in the 3d section expressly guards against the interference of the statute with the acts for regulating pawnbrokers. This is a pawnbroking transaction, and the neglect to comply with the provisions of the 6th section of the act renders the contract illegal, the defendant being a pawnbroker. The 2 & 3 *Vict.* renders valid contracts of loan though more than 5*l.* per cent. may be taken for the interest, but if more than 5*l.* per cent. is taken on the deposit of goods by way of pledge by a pawnbroker, he must comply with the provisions of the 6th section of the Pawnbrokers' Act.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—This was an action of trover, by the assignees of a bankrupt against a pawnbroker, to recover valuable articles pledged with defendant by the bankrupt, before his bankruptcy in 1841, on loans of more than 10*l.*, reserving more than 5*l.* per cent. interest, but without entering them in a book, in conformity with stat. 39 & 40 *Geo.* 3, c. 99, s. 6.

The plea was, that plaintiff was not possessed. A special case was stated for the opinion of this Court, but, though it contained some other particulars, the single fact above mentioned was alone sufficient to raise the questions of law which were argued before us as to the application to that fact of statutes 39 & 40 *Geo.* 3, c. 99 and 2 & 3 *Vict.* c. 37.

The former, usually called the Pawnbrokers' Act, following statutes 30 *Geo.* 2, c. 24 and 24 *Geo.* 3, c. 42, allows pawnbrokers 20*l.* per cent. interest on goods pawned. All

these acts prescribe the rate of interest on certain loans, the scale not rising above 10*l.*, as if it was uniformly assumed that a larger sum could never be borrowed at one time, at least of a pawnbroker, on a pledge of goods. Some other enactments may indeed raise an argument that this limitation was not intended, but we think all question on this point is removed by the judicial construction which the act has received from Lord *Tenterden* in *Cowie v. Harris* (a), and from the Court of Common Pleas in *Tregoning v. Attenborough* (b). Conformably with these decisions, we hold that the Pawnbrokers' Act does not apply to loans of more than 10*l.* Then the loan being such as the usury laws declare void, the question arises whether it is protected by 2 & 3 *Vict.* c. 37. We have fully considered that act, with all those that have preceded it, namely, 3 & 4 *Will.* 4, c. 98, s. 7, which repealed the usury laws as affecting bills and notes made payable at three months, or which had only three months to run, and 7 *Will.* 4 & 1 *Vict.*, which extended the term of three months to twelve. The act now under consideration extended these provisions to loans without bills or notes. Two later statutes have prolonged its operation to the 1st of next July, but they supply no argument on this point. The act of 2 & 3 *Vict.* was in force at the time of the transactions now under our consideration, and, without entering into a lengthened discussion of all that may be urged on either side as to the probable intention of the legislature, we hold that the loans in question are within the protection of that act, and that during its continuance usurious loans without real security are lawful. The Court of Exchequer pronounced the same opinion in the late case of *Turquand v. Mosedon* (c). We entirely agree, feeling the words of the enactment too strong to be overcome. Our judgment must therefore be for the defendant.

Judgment for defendant.

(a) *Moody & M.* 141.      (b) 7 *Bing.* 97.      (c) 7 *M. & W.* 504.

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June 24th.

## THE QUEEN v. PREECE.

The Court of Queen's Bench will not in its discretion grant a rule for an information in the nature of a quo warranto against the mayor of a borough, where the ground of objection to his title is that he was unduly elected alderman, such election having taken place more than twelve months before the rule was moved for; there being no special circumstances to induce the Court to interfere.

The "notice of his election," within five days of which the mayor elect is required, by 6 & 7 Will. 4, c. 76, s. 51, to "accept such office, by making and subscribing the declaration," means notice acquired either by being present at the election, or by official notification; where, therefore, it appeared that the party elected had no notice of either of these descriptions, but had received information of his election in a private manner, it was held that he was not bound to subscribe the declaration within five days of being so informed.

Where a quo warranto is applied for against a mayor, the ground specified in the rule nisi being that he was unduly elected *alderman*, this is not such a statement of objection as to be defective under the rule H. T. 7 & 8 Geo. 4 that "the objection intended to be made to the title of the defendant shall be specified in the rule to shew cause," if it appear from the affidavits that his title as mayor, which is challenged, was founded upon his title as alderman.

THIS was a rule for an information in the nature of a quo warranto, against *Richard Matthias Preece*, to shew by what authority he held the office of mayor of the borough of Caernarvon.

The two grounds, stated in the rule nisi, on which reliance was placed, were, 1. That Mr. *Preece* was not duly elected an alderman of the said borough (the grounds of which objection were stated at length, but which it is unnecessary to report). 2. That Mr. *Preece* did not, within the time limited by the statute, take upon himself the office of mayor, or make the declaration in that behalf required by the statute.

Sir *W. W. Follett* S. G. and *Kelly* shewed cause, and took a preliminary objection, that, as regarded the first objection, the rule nisi did not comply with the Reg. Gen. H. T. 7 & 8 Geo. 4, by which it is ordered, "that from henceforth the objection intended to be made to the title of the defendant shall be specified in the rule to shew cause," and that no objection not so specified shall be raised by the prosecutor without special leave. The objections here taken are to the title of the defendant as alderman. They may, or may not, be objections to his title as mayor. It does not appear on the face of the rule that the qualification on which he was elected mayor was his qualification as alderman. The mayor may be elected from the coun-

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cillors: 5 & 6 *Will.* 4, c. 76, s. 49. [Lord *Denman* C. J. The Court can look at the affidavits, to see whether the objection taken in the rule is really pointed at the defendant's title as mayor.] At all events this Court, in the exercise of its discretionary power, will consider this application as made too late. The provisions of 7 *Will.* 4 & 1 *Vict.* c. 78, s. 23, limit applications for quo warranto informations to twelve calendar months. Mr. *Preece* is therefore irremoveable from his office of alderman. Clearly this statute ought in principle to extend to his office of mayor also, otherwise this absurdity must follow, that he will be remitted from his office of mayor to that of alderman by the force of those very arguments, which shew that his election as alderman is invalid. It is true that in *Rex v. Stokes* (a) (under the statute of 32 *Geo.* 3, c. 58, s. 1, which fixed six years as the limitation), the Court made the rule absolute for a quo warranto for exercising a derivative office upon a defect of title to the first, which was of more than six years' standing. But the case does not appear to have proceeded farther, and cannot be regarded as a precedent controlling the discretion which this Court possesses: *Rex v. Stacey* (b), *Rex v. Brookes* (c), *Reg. v. Hodson* (d).

As to the second point, the facts appear from the affidavits to be these: that Mr. *Preece* was elected mayor on the 9th November, 1842, being at that time in London; that on or about the 11th of November, while still in London, he was informed by letters from his family in Caernarvon of the fact of his election; that he returned to Caernarvon on the 22d, and had no other notice of his election until the 25th, when it was formally notified to him by the town clerk, and he made the declaration on the 28th. Under these circumstances it cannot be said that he "had notice" of his election, within the meaning of 5 & 6 *Will.* 4, c. 76,

(a) 2 *Mau.* & S. 71.

(c) 8 B. &amp; C. 320.

(b) 1 T. R. 1.

(d) 11 *Law J.* (N.S.) Q. B. 219.

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s. 51, until the 25th, and consequently the declaration is in time.

*Jervis and Welsby contra.*

*Cur. adv. vult.*

Lord DENMAN C. J., on a subsequent day in this Vacation (June 27), delivered the judgment of the Court as follows:—The first objection to Mr. *Preece's* title was, that he did not accept his office within the five days “after notice” required by the 51st section of the 5 & 6 *Will.* 4, c. 76, and that therefore his election became void. The notice was argued on one side to mean no more than the declaration of the result of the election, which (it was said) all persons elected are bound to know; on the other hand it was said to mean nothing less than a formal notification by some proper authority. The fact lay between, defendant having been in London on the 9th, when the election took place, and from that time till the 22d, when he returned to Caernarvon and took the oath of office within the five days; but he was in the meantime, while in London, made aware by family letters, and the congratulations of friends whom he casually met, but not from any official source, that he was elected. We are of opinion that casual information is not sufficient, and that before an elected officer can be visited with the heavy penalties imposed for neglecting to accept his office, he must have regular notice of his own election, either by being actually present when it is announced, or by being apprised of the fact by some official authority. But the validity of this election is challenged on another ground, namely, that he was not well elected alderman, and had been elected mayor as such alderman; but his election to the former office had taken place more than twelve months before this rule was moved for; it was admitted, therefore, that no application could then have been made to remove him from his office of alderman by virtue of 7 *Will.* 4 & 1 *Vict.* c. 78, s. 23, and that if re-

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moved from the office of mayor he would still remain a good alderman; and this acquiescence by the present relator, and by all the world, was urged as a reason why, in the exercise of our discretion, we should refuse to interfere by information against him. To meet this objection, the case of *Rex v. Stokes*(a) was relied on. That was decided on the 1st and 3d sections of 32 Geo. 3, c. 58, the latter of which protected parties from impeachment by quo warranto, by reason of any defect of title in the person electing, nominating, swearing them into office, or admitting them, if such last named person had been ten years de facto and with title unquestioned in his office; and this section was held not to apply where the defect was in the title of the party himself to a former office, which formed in part his qualification to that in question; at least, this was held so doubtful, that the rule was made absolute. No further proceedings in the case are reported; nor do we find, upon inquiry, that the point ever came for final decision before the Court upon the record. It cannot be denied that there is a strong analogy between that case and the present; and in a case, in which we had a less free discretion to exercise than in the granting or refusal of a quo warranto, it might properly bind us. But upon consideration we think that we shall best advance the policy of the modern statutes, and preserve the peace of municipal bodies, by refusing to make the rule absolute. It seems to us highly objectionable, that the title which has not been questioned, and cannot be questioned, to the inferior office, should be impeached at a subsequent period, when the title to a higher office has been built upon it; and that there is an absurdity in ousting a mayor, because he was not a good alderman, who upon his ouster must immediately be remitted to his office of alderman, and cannot be disturbed in it. It is certainly just, that objections intended to be made should be brought forward promptly, while the facts are recent and easily capable of proof or explanation; and it con-

(a) 2 Mau. & S. 71.

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tributes neither to the independence of the officer, nor to the harmony of corporations, if such objections are allowed to be kept in reserve, and brought forward in case the conduct of the officer is displeasing to the objector, or he aspires, as he has a right to do, to some higher office. No inconvenience can result to others from the present mayor retaining his office, as the 1st section of the 7 Will. 4 & 1 Vict. c. 78, makes him a good presiding officer at all corporate meetings for election of others, at which the mayor ought to preside; nor could any benefit result from the rule being made absolute, as no judgment of ouster could, with the utmost diligence, be obtained against him, till within a very few days of the expiration of his year of office.

Upon these grounds, therefore, we think this rule ought to be discharged.

Rule discharged.



Sir AUGUSTUS BRYDGES HENNIKER, Baronet, and others  
 v. LIONEL WIGG, NERIAH WIGG, the elder, NERIAH  
 WIGG, the younger, HERBERT WIGG, and EDWARD  
 WIGG.

*Friday,  
 June 23rd.*  
 In an ordinary DEBT on a bond, dated the 10th January, 1837, for 2000*l.* The defendants set out the bond on oyer, the condition of which was for payment by the defendants of 1000*l.* to the plaintiffs, with interest for the same at and  
 In an ordinary banking account the first item of the debit side is discharged by the first item on the credit side. But where the plaintiffs were bankers, and one of the defendants upon opening an account with them had borrowed of them 1000*l.*, for which he, together with the other defendants, became bound to the plaintiffs, with a condition for repayment with interest by a certain day, and continued afterwards to pay in and draw out money upon the usual footing of a banker's account; and the first sum entered to his debit on the account was partly made up of the 1000*l.*, to secure which the bond had been given. *Held*, on a plea of solvit post diem, that the bond was not satisfied by sums subsequently paid in exceeding in amount the 1000*l.*, it not being the intention of the parties that the first item of the debit side should be reduced by the first item of the credit side, but that the bond should stand to secure the plaintiffs against such advances as they should from time to time make to the defendant.

after the rate of 5*l.* per cent. per annum, on or before the 6th day of April then next ensuing, and pleaded, 1st, non est factum; 2nd, payment after the said 6th day of April in said condition mentioned, and before the commencement of this suit, to wit, on the 28th day of September, 1837, of the said sum of 1000*l.*, together with all interest then due thereon.

The cause came on to be heard before Lord *Denman* C. J., at the sitting after Michaelmas Term, 1841, when a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case, of which the material facts are as follow:

The plaintiffs were trustees of the East of England Bank, and had a branch establishment at Saxmundham, in Suffolk. *Lionel Wigg*, the principal debtor, before opening any account with the plaintiffs, had an account with the National Provincial Bank at Halesworth, and owed them a balance. He applied to the plaintiffs, through their manager of the Saxmundham branch of their bank, for a credit of 1000*l.*, which he said he wanted to pay off the balance at the other bank. He had previously requested an advance of 2000*l.* The plaintiffs declined to advance the 2000*l.*, but offered to advance him 1000*l.* on his giving sureties to that amount. He said his father, *Neriah Wigg* the elder, and his brothers, the other defendants, had agreed to join him in the bond which he and one of the other defendants (*Herbert Wigg*) executed on the 10th January. The other defendants executed it on the 12th of the same month.

*Lionel Wigg* paid into the plaintiffs' bank the several sums of 85*l.* on the 3rd January, 196*l.* 10*s.* on the 7th, 35*l.* 5*s.* on the 11th, and 102*l.* on the 12th.

On the 10th he drew a check on the plaintiffs' bank in favour of the National Provincial Bank for 1294*l.* 6*s.* in the name of *Riches*, which was paid at the branch of the plaintiffs' bank at Halesworth, on the 11th, to the National Provincial Bank.

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It did not appear that after this period *Lionel Wigg* kept any longer an account, or had any further transactions with the National Provincial Bank, but down to the 18th September, 1840, he continued to keep a banking account with the plaintiffs.

A pass book was kept between the plaintiffs and *Lionel Wigg*, in which the payments made by him were entered to his credit, and the checks drawn by him were entered to his debit.

The commencement of the account in the pass book was as follows:—

The East of England Bank, Saxmundham, in account with  
*Mr. Lionel Wigg.*

| 1837.               | £   | s. | d. | 1837.                | £    | s. | d. |
|---------------------|-----|----|----|----------------------|------|----|----|
| Jan. 3, By Cash . . | 85  | 0  | 0  | Jan. 12, To Riches . | 1294 | 6  | 0  |
| 7, Ditto . .        | 196 | 10 | 0  | 13, Moore . .        | 20   | 16 | 0  |
| 11, Ditto . .       | 35  | 5  | 0  | 17, Richardson       | 16   | 12 | 6  |
| 12, Ditto . .       | 72  | 0  | 0  | 19, Coleman          | 59   | 0  | 0  |
| Ditto . .           | 30  | 0  | 0  | Riches .             | 100  | 0  | 0  |
| 17, Ditto . .       | 449 | 0  | 0  |                      |      |    |    |
| 26, Ditto . .       | 68  | 0  | 0  |                      |      |    |    |

In the pass book and ledger no distinction was made between cash and bills, but bills not due were entered as cash. The first rest in the account in the pass book and ledger was on the 5th April, 1837, when a sum was charged for interest. This latter sum included interest on the daily advances in the usual way, and also the amount of discount on the bills paid in by *Lionel Wigg* and entered in the pass book and ledger as cash, (such discount being computed from the day at which the bills were paid in until they became due).

There were similar rests and charges for interest and discount as before mentioned every April and October during the whole time that the account was running.

On some occasions (bills being entered as cash in manner aforesaid) the balance appeared in the ledger and pass

book to be in favour of *Lionel Wigg* to an amount exceeding the whole amount payable for discount since the preceding rest.

The balance due from him at the time of his failure and the close of his account on the 18th September, 1840, was 1505*l.* 17*s.* 11*d.*, which sum remains due to the bank. The total amount of monies received from him by the bank from time to time during the account exceeded 139,000*l.* More than 1000*l.* had been entered to his credit before the expiration of the month of January in which the bond was given, and more than 1700*l.* before the first rest on the 5th of the following April.

In September, 1840, the defendants, *Lionel Wigg* and *Herbert Wigg*, came to the plaintiffs' bank, and *Herbert Wigg* said, in *Lionel Wigg's* presence, that he hoped the bank would not stop his brother *Lionel*, as the bank had the security of the bond for 1000*l.*, but the manager of the bank replied, that the account could not go on. The account then ceased. In the October following the defendants, *Neriah Wigg* and *Edward Wigg*, called at the bank, they said they were aware they were liable to pay 1000*l.* on their bond, but they hoped the bank would not press very hard, but wait two or three years. The manager said, "certainly there would be no objection." They said, "the sooner we can settle the better, as the interest is running."

On the 7th November following, *Neriah Wigg* wrote to the manager of the plaintiffs' bank the following letter.

"*Thomas Mayhew*, Esq.

"Sir—You will oblige me by informing me the amount of the bond, and interest upon the same, charged to me and brothers, by return of post.

Wangford,

"I am, Sir, yours respectfully,

Nov. 7, 1840.

"*Neriah Wigg.*"

To which Mr. *Mayhew*, the manager, returned the following answer.

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" East of England Bank, Saxmundham,

" Nov. 9, 1840.

" Sir—I have received your letter of the 7th instant, in answer to which I beg to say, that the amount of the bond is 1000*l.*, and the interest thereon 19*s.*

" Mr. *Neria* Wigg.

" *Thomas Mayhew.*"

The amount of principal and interest then due on the bond, supposing it not to have been paid, was 119*s.* After the date of this letter *Neria* Wigg called at the bank again, and said he was aware he was liable for principal, but he was doubtful whether he was liable for interest.

At the trial it was contended by the defendants' counsel, that the payments into the bank made by *Lionel* Wigg from time to time had discharged the bond, and those payments proved the plea of payment, but the plaintiffs' counsel contended that the whole principal and interest secured by the bond remained due upon it.

The question for the opinion of the Court was, whether the plea of payment was proved by the facts above stated; if the Court should be of opinion that the plea of payment was not proved, then the verdict to stand for the plaintiffs on that plea as aforesaid. But, if the Court should be of a contrary opinion, then a verdict on that plea to be entered for the defendants.

*Kelly* for the plaintiffs. (a) The question for the Court is whether, upon the facts stated in this case, the defendants have proved their plea of solvit post diem, which depends upon whether one or more payments have been made in satisfaction of the bond. The date of the bond is the 10th of January, and the condition is for repayment of the money lent on the 5th of April following. If all sums entered to the credit of *Lionel* Wigg are to be considered as payments on account of the bond, on the principle in *Clayton's*

(a) This case was argued during the Term (May 30), before Lord Denman C. J., Patterson, Williams and Coleridge Js.

case, (a) that the first sum paid in is the first drawn out, the banking account will shew that the bond was paid before it was due. But it cannot be contended that one of the obligors by paying money into the banking account discharged the bond before it was due; if so, by which payment, one or more, was it discharged? But even this will not prove the plea of solvit post diem. [Coleridge J. At one time the balance was turned.] The question is whether the bond was not given as a security for the floating balance. The plaintiffs may be entitled to no damages, or there might have been a special plea to meet the case, but on the mere plea of payment the defendants cannot succeed, because at one period of the account the balance was turned. The payments before the bond was due could not satisfy the bond unless such were the intention of the parties, and the payments after the bond became due were upon the same footing as those before. In order to be in discharge of the bond they must have been expressly made for that purpose, or such intention must have been implied from the course of dealing between the parties. Did the defendant *Lionel Wigg* consider the sums paid into his account as deposits or as payments on account of the bond; or might not the bankers have stipulated that the sums paid in by the customer should operate in reduction of the sum for which the bond was security, but not in discharge of the bond? But if this might be the case, the only question is as to the intention of the parties. Now, after the payments had been made, two of the defendants state that they were not made in payment of the bond. *Clayton's* case will be relied on on the other side, but that case and all the others are in truth decided upon the inference to be drawn from the acts of the parties. In *Pease v. Hirst* (b) credit had been given by the bankers to the customer upon the joint note of three persons, and the sum advanced carried to his credit in his pass book and interest charged to him upon it half-yearly, but the customer had at one time in the

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(b) 10 B. &amp; C. 122.

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hands of his bankers a balance exceeding the amount of the note. There *Bayley*, J. says, "it was contended that the plaintiffs are bound to consider the debt due on the note as paid and wiped off by that balance. It does not appear that that was a cash balance, but, if it had been, the bankers would not have been bound to apply it in payment of the note. It would be directly contrary to the intention for which the note was given that it should be paid off by the first money of *Jonathan Hirst* which came to the hands of the banker." [*Patteson* J. In that case the banker had credited the customer with the sum advanced, and the cash balance partly consisted of that.] If this is payment, every payment must be applied to the earliest item of account; but the rule in *Clayton's* case (a) is only one of inference drawn from the conduct of the parties. The Master of the Rolls there says, "In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place. Presumably, it is the sum first paid in which is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side." Here, the Court are to say whether they will infer, from the mere fact of the payment of sums to the customer's account with the bank, that the payments were made in discharge of a separate security, to which others besides the customer were parties. In *Bodenham v. Purchas* (b) the separate transactions were blended, and the Court drew from the conduct of the parties their judgment as to their intention. Here, after the payments have been made, the parties come and admit the existence of the security and ask for further time; thus it is clear, that, admitting the balance to have been at the time turned, yet the bond was given as a security for the floating balance, and the plaintiffs are entitled to recover.

Sir *W. W. Follett* S. G. contra.—The doctrine in *Clayton's*

(a) 1 Mer. 604.

(b) 2 B. & Ald. 39.

case(a) is that, where there are separate accounts, the question of appropriation arises, but where there is only one account there is no room to inquire into the intention of the parties, but the act of payment is appropriation. *Bodenham v. Purchas*(b) was the case of a bond to guarantee, and then a change of firm, and the guarantee there was held to be discharged. But this is a common bond for the payment of a sum of money advanced to the customer to enable him to remove his account from the National Provincial Bank, and pay off what he owed them, with a view to his opening an account with the plaintiffs. The money was advanced upon his giving the security, and the 1000*l.* put to his debit in his banking account. It is impossible to treat this transaction as a dealing on two separate accounts. The mode of charging the interest and of keeping the account shews it was not so. It was not 1000*l.* lent to the defendant by the plaintiffs on the joint bond of himself and his co-obligors, and then placed to his credit in the banking account, but a mere entry of a sum to his debit in the banking account, of which the 1000*l.* lent on the bond forms part. In *Bodenham v. Purchas*(b) *Bayley J.* says, "where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases, but where the accounts are treated as one entire account by all parties that rule does not apply." That was the case here, the money for which the bond was a security was blended with the other items of the banking account, and interest charged upon that principle, and they formed one entire account. In *Pease v. Hirst*(c) credit was given to the customer in his pass book for the money advanced on the note and interest charged to him upon it yearly, the accounts being kept distinct. But here the 1000*l.* was never entered to the credit side of the customer's account, or interest charged upon it distinct from what was due on the

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(b) 2 B. &amp; Ald. 39.

(c) 10 B. &amp; C. 122.

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balance of the banking account. It is not contended that the sums paid in by *Lionel Wigg* are to be applied in payment of the bond, but that the amount of the bond being placed on the debit side of the account was paid by the sums paid to his credit, and this is an answer to the objection that the bond was paid before it was due. The bond was not paid before it was due, but the money borrowed on the bond was repaid before the bond became due, and the obligees were bound to apply it in discharge of the bond as soon as the day of payment arrived. The important distinction is, that the accounts in *Pease v. Hirst*(a) were kept distinct. In *Eyton v. Knight*(b) advances had been made by bankers to their customers, and a mortgage executed to secure any balance which might exist against them afterwards. There was a change in the banking firm by the death of one of the partners, and the admission of a new partner, at which period there was a balance against the customers, which was carried to their account with the new firm, and sums afterwards paid in more than sufficient to turn the balance, and it was held that the balance was discharged by those payments, and that the mortgage was no security for a balance subsequently incurred. Lord Langdale M. R. there says, "No doubt the new firm might have made such application of the money as they thought fit, but, they having made no particular application, what application is the Court to make? It is clear it is to be applied to the satisfaction of the first item of the account carried on by the new firm." But at one time there was a balance in favour of *Lionel Wigg*. Could the plaintiffs then sue on the bond? The argument on the other side assumes that they could, for the banking account is said to be a different account from the bond account, and the payments into the bank not to have been made on account of the bond. As to the conversations between the plaintiffs and two of the defendants, they do not bear on the case. None of the de-

(a) 10 B. &amp; C. 122.

(b) 2 Jur. p. 8.

sendants had anything to do with the account except *Lionel Wigg*, and what has been done in respect of payment must appear from the terms of the bond, and the manner in which the account has been kept. If the bond has been in fact paid, the conversation between two of the co-obligors and the plaintiffs cannot vary that fact. [*Patteson J.* Mr. *Kelly* puts it, that, if there were only one account, the bond must be taken to guarantee the balance, and the sums paid in to be only deposits, and not payments on account of the bond.] The bond must speak for itself as to that, the condition would then be different. [*Coleridge J.* He avoids that difficulty, because the question turns on the payments, not on the bond.] That is putting a different construction on an ordinary payment to change the condition of the bond, which is an ordinary money bond, and the account the ordinary account between a banker and his customer.

*Kelly* in reply. The question is purely one of fact, as to the intention of the parties. If the action had been brought when no balance was due to the plaintiffs on the banking account, the question would still have been the same, and, unless the defendants could have proved a payment of the bond at or after the day, the plaintiffs must have recovered at law, but equity would have relieved from the bond in that case. But the plea of payment cannot apply when the facts do not amount to a payment at law. The sole question is, whether the payments made were made on the bond after the day of payment, which is purely a question of fact; and to be decided from the conduct of the parties. The sums paid in are not really payments; if so, they must have all been paid on account of the bond, but the first was made before the bond was given. If the defendant, *Lionel Wigg*, had said, I intend the sums paid in to be on the ordinary account, and not on the bond, then they would clearly not have been payments. The

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Court is to say whether he does not in fact say so by his course of dealing. The proof of the plea is on the defendants, and the plaintiffs are entitled to recover on the bond, unless the defendants can shew that they have specifically discharged it.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—This was an action of debt on bond, brought by the plaintiffs as trustees of the East of England Bank, against the defendants, who severally executed the said bond.

The condition (set out upon oyer) was simply for repayment of the amount (1000*l.*) with interest, on or before the 6th of April, 1837; the bond itself bearing date the preceding 10th of January.

The plea was *solvit post diem*, and upon that the question arises.

The facts materially bearing upon the question are as follow: *Lionel Wigg*, the first named defendant, having had dealings with "The National Provincial Bank," and being indebted to them, applied to the plaintiffs' bank for a credit of 1000*l.* to pay off the National Provincial Bank. That was declined, but they agreed to advance the defendant 1000*l.* upon the other defendants joining him in a bond to that amount, which was accordingly executed by *Lionel* and *Herbert Wigg* on the 10th of January, 1837, and by the other defendants on the 12th.

Before either of those days, the first named defendant had paid into the plaintiffs' bank two several sums, 85*l.* on the 3d January, 196*l.* on the 7th, and on the 12th 102*l.* He had also paid 35*l.* on the 11th.

The defendant *Lionel Wigg* appears to have ceased dealing with the National Provincial Bank after paying to them the sum of 1294*l.* 6*s.* through the plaintiffs' bank, which said sum of 1294*l.* 6*s.* is the first item on the debit side of his account in the pass book of *Lionel Wigg*, viz.

on the 12th of January, and commenced a banking account with the plaintiffs, the first transaction being the payment by him into their bank of the said sums before the date of the bond, which formed the first items in his pass book on the credit side.

It does not seem necessary to pursue minutely the details of the defendant *Lionel Wigg's* account with the plaintiffs, because it does appear that, between the opening of his account and his failure at the close, on the 10th of September, 1840, when the balance was against him 1505*l.* 17*s.* 11*d.*, the balance had been in his favour to a greater amount than was due upon the bond for principal and interest. And the question is, whether the payments by the defendant *Lionel* into the bank beyond the amount of the bond, or still more, the balances exceeding its amount, ought to have been applied in discharge of the bond.

It was contended that, as the bond was executed by some of the defendants on the 10th of January, and by all on the 12th, the sum of 1294*l.* 6*s.* above noticed, must, from the date, have included the 1000*l.*, to secure which the bond was given; that the whole formed one account, and that an ordinary banking account, in which, according to the language of Sir *W. Grant*, "all the sums paid in form one blended fund, the parts of which have no longer any separate existence," and that "it is the first item of the debit side of the account that is discharged or reduced by the first item on the credit side:" *Clayton's case* (a), and *Bodenham v. Purchas* (b), in which case the doctrine of Sir *W. Grant* was fully adopted. And it is presumed that, generally speaking, and with reference to a case like that which he was considering more especially, the doctrine of that eminent judge admits of no doubt. But it is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary

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the case; and that would be the effect in the present instance, if it should appear that this bond was given to secure the plaintiffs against advances which they might *from time to time* make to the defendant *Lionel*. That would shew that the amount of it was not to be brought into account like any other item, in the manner supposed by *Sir W. Grant*. What was the precise nature of the agreement between the parties at the time of giving the bond does not very distinctly appear. But the conduct and language of the defendants, or some of them, which we find detailed in the case, have a strong bearing upon this point. In the month of September, 1840, *Herbert*, in the presence of *Lionel Wigg*, expressed a hope that the bank would not stop his brother *Lionel*, as they had the security of the bond for 1000*l*. In October following, the defendants *Neria* and *Edward* expressly avowed their liability to pay 1000*l*. on their bond. On the 7th of November following, the defendant *Neria* wrote to the manager a letter in terms which admit his liability. And the same defendant shortly afterwards called at the bank, and said, "he was aware he was liable for the principal, but was doubtful whether he was liable for interest."

From this evidence, which is expressly submitted to our consideration, we know not at what conclusion we can possibly arrive, except that this bond was given as a continuing security, and consequently has not been discharged.

Our judgment must therefore be for the plaintiffs.

Judgment for the plaintiffs.



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The QUEEN v. The Bishop of BATH and WELLS.

**ERLE** had obtained a rule to shew cause why a writ of mandamus should not issue, directed to the Bishop of Bath and Wells, commanding him to grant a license to *William Cooke Osborne*, clerk, to be chaplain of the new gaol and house of correction for the city and borough of Bath, in the county of Somerset, and within the diocese of the said Lord Bishop, if the said *William Cooke Osborne* should by him be found to be a fit and proper person to be such chaplain.

It appeared from the affidavits that prior to the passing of stat. 5 & 6 Will. 4, c. 76, the city of Bath was incorporated by the name of the Mayor, Aldermen, and Citizens of the City of Bath, and that by the charter of incorporation under letters-patent of the 32nd of Queen *Elizabeth*, the mayor, aldermen and common council of the said city had power and authority yearly to elect two of themselves to be bailiffs of the said city for one whole year, with power to fill up a vacancy in the office occurring during the year. The charter also contained a grant of a gaol in the following words: "And we will, and by these presents for us, our heirs and successors, do grant to the aforesaid mayor, aldermen and citizens of the said city, and to their successors, that the said mayor, aldermen and citizens, and their successors, shall and may have within the said city, or the liberties thereof, a prison and gaol for the preservation and keeping of all and singular prisoners attached and to be attached or committed or adjudged to the prison or gaol, in any sort howsoever, within the liberties of the said city or

Prior to the 5 & 6 Will. 4, c. 76, the city of Bath was incorporated by the name of the Mayor, Aldermen, and Citizens of the City of Bath. The charter contained the grant of a gaol, and a limited criminal jurisdiction to be exercised by the recorder and the corporate justices, but not extending to felonies. It also authorised the mayor, aldermen and citizens annually to elect two of themselves to be bailiffs of the said city, and directed that the bailiffs for the time being should be keepers of the gaol of the city. After the passing of the Municipal Corporation Act, the new corporation received the grant of a se-

parate court of quarter sessions, with power to try felonies, and certain persons were appointed justices for the city by commission; but the corporation still continued to elect one bailiff, who continued to be the keeper of the gaol, and appointed the gaoler. In 1842 a new gaol and house of correction was built under the provisions of the 1 Vict. c. 71, to which the town council had appointed a chaplain.

*Held*, that the right to appoint the chaplain of the new gaol and house of correction, under statute 2 & 3 Vict. c. 46, s. 15, was in the town council, by virtue of their authority to appoint the keeper of the prison, and not in the borough justices.

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the precincts thereof, or at the sentence, commandment, or suit of us, our heirs and successors, or any other person whatsoever, for any matter, cause, or thing which may or ought to be inquired, prosecuted, punished or determined in the said city, there to remain until they be delivered according to law : and if any persons or prisoners shall be arrested or committed to the gaol or prison of the said city for any cause, matter, fact or offence which may not or ought not to be inquired, prosecuted, or determined within the said city, that then the mayor, recorder, and such of the aldermen of the said city as for the time being shall be justices of the peace within the said city, or any of them, shall and may have full and absolute power and authority to send and commit such persons or prisoners to the common gaol of our said sovereign lady the Queen's Majesty, her heirs and successors, within the county of Somerset, there to remain until he or they shall be thence delivered according to law : and that the bailiffs of the said city for the time being may and shall be keepers of the gaol or prison of the said city." The letters-patent also contained a grant to the aforesaid mayor, aldermen and citizens, and their successors, that the mayor and recorder of the said city, and such two of the aldermen of the said city for the time being as by the mayor, aldermen, and common council of the said city, or the greater part of them, should be from time to time for ever in that behalf nominated and elected, might and should be jointly and severally justices of the peace in the same city, and the liberties and precincts thereof, with power and authority to try certain misdemeanors therein arising, but with no jurisdiction to try felonies committed in Bath. The charter also contained the grant of a court of record for the trial of personal actions, to be held before the mayor, recorder, and two aldermen, being justices ; and the said bailiffs had the execution of warrants under that court. The same charter also contained the grant of a court of pie poudre, to be held before the said bailiffs ; and the mayor was appointed coroner of the city and liberties. It also appeared that from

the granting of the said charter of incorporation until the 22nd of September, 1834, the mayor, aldermen and common council of the city did annually elect two of themselves to be bailiffs, and that such bailiffs had always had the care and keeping of the gaol and the appointment of the gaoler thereof up to that time; but that since that time it had been the custom for the mayor, aldermen and common council of the said city to elect but one bailiff, who had always since that time acted as and been keeper of the said gaol, and had appointed the gaoler of the said gaol. It also appeared that by the municipal corporation act the metes and bounds of the city of Bath had been extended to the parliamentary boundary of the borough; and that it had received, under the provisions of the same act, the grant of a separate court of quarter sessions, and that a new gaol and house of correction had been lately erected within the said city, under the provisions of stat. 1 Vict. c. 78, which the justices of the city and borough of Bath exercise the right of regulating, and to which they commit offenders for offences committed within any part of the said city and borough, as well that part within the ancient city as also that part which had been added to it by the municipal corporation act. On the 22nd of February, 1843, the town council appointed the Rev. *William Cooke Osborne* to be the chaplain of the new gaol, and gave notice of the appointment to the Bishop of Bath and Wells. The right of appointment was also claimed by the justices of the peace for the city and borough; and the above rule was moved for the purpose of obtaining the decision of the Court upon the rights of the respective parties to appoint a chaplain to the said gaol.

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Sir *W. W. Follett* S. G. and *Smirke* now shewed cause (a). The question in reality turns on the true construction of the 25th section of statute 4 Geo. 4, c. 64, in connection with the 15th section of the statute 2 & 3

(a) During the term (June 1,) before Lord *Denman* C. J., and *Patte-son*, *Williams* and *Wightman* Js.

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*Vict. c. 56.* The former statute is intituled "An Act for Consolidating and Amending the Laws relating to the Building and Regulating of certain Gaols and Houses of Correction in England and Wales," and extends to common gaols, that is, the gaols of sheriffs of counties, county houses of correction, and the gaols and houses of correction of the cities and towns mentioned in schedule A. of the act. The first section of statute 2 & 3 *Vict. c. 56*, extends the provisions of the former statute to all gaols and houses of correction in England, and the 15th section enacts, that "in every borough gaol and house of correction, a clergyman of the Church of England shall be appointed to be chaplain thereof by the same authority by which the keeper is appointed." The question therefore is, by what authority is the keeper of the new gaol of the borough of the city of Bath appointed. It is sufficient to contend here that he is not appointed by the town council; but a review of the several statutes relating to gaols and houses of correction will shew that the authority to appoint is in the justices of the borough.

First, then, the right of appointing the chaplain of the gaol is not in the town council. Statute 1 *Vict. c. 78*, contains two distinct provisions with regard to the gaols of boroughs. By the 37th section the powers of the 4 *Geo. 4*, c. 64, and the other statutes which relate to the building, enlarging and repairing gaols and houses of correction are placed in the town council; but the 38th section enacts that the powers of *regulation, and all things provided by any act of parliament to be done at any general or quarter sessions of the peace*, "in relation to the regulation of any such gaol or house of correction, shall be exercised and done by the justices of the city or borough to which such gaol or house of correction shall belong." Although this does not in direct terms authorise the justices to appoint the officers of the gaol, yet no provision being in fact made for their appointment, the right of appointment is involved in the power of regulating the gaol, for which purpose the justices are directed to hold special sessions, the Court of Quarter

Sessions, since the Municipal Corporation Act, being held before the recorder alone. [*Coleridge J.* If they appoint, it must be without a salary.] The confusion arises from the proviso in the 38th section. But it will be argued that the bailiffs are keepers of the gaol, and that, because the town council appoint the bailiffs, therefore they appoint the keepers of the gaol. There is however no provision in the Municipal Corporation Act for the appointment of bailiffs in Bath or other corporations by the town council, although under section 61 there is a provision for the appointment of a person to execute the office of sheriff in the places therein named. But it is clear that the bailiffs are not keepers of the gaol within the meaning of the 4 *Geo. 4*, c. 64, for throughout the whole act the term keeper of the prison is used in the sense of gaoler. Thus in the 10th section the keeper of the prison is to reside therein. So the provisions of sections 14, 19, 20, 21, 22 and 26, clearly shew that by keeper of the prison is meant not the sheriff but the gaoler. So in the old statutes the keeper of the prison means the gaoler; 8 & 9 *Will. 3*, c. 27. The same also appears from the provisions of the 2 & 3 *Vict.* c. 56, ss. 6, 7, and 24. But the bailiffs had originally the same relation to the gaol of the corporation as the sheriff has to the county gaol, and therefore, if the town council are correct in their construction of the 15th section of statute 2 & 3 *Vict.* c. 56, it is the bailiffs and not the town council that have the right of appointing the chaplain, for the bailiffs appoint the gaoler.

But secondly, the right of appointment belongs to the justices. By the provisions of statutes 19 *Geo. 3*, c. 58, and 22 *Geo. 3*, c. 64, the justices of the county had the right of appointing chaplains both in county gaols and county houses of correction. Statutes 31 *Geo. 3*, c. 46, and 55 *Geo. 3*, c. 48, made further provisions with regard to the chaplains of county gaols, but retained the right of nomination in the county justices. These acts only apply to county gaols and county houses of correction, but statute 4 *Geo. 4*, c. 64, extends to the gaols of the several cities, towns and places

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named in schedule A. to that act, and provides for the regulation as well of county gaols and county houses of correction, as of the gaols and houses of correction of the several cities, towns and places named in schedule A.; and the 25th section authorises "the justices to nominate and appoint keepers for every prison within their jurisdiction to which that act extends, except the *keeper of the common gaol*." The question therefore turns on the meaning of the expression "the common gaol" in statute 4 *Geo. 4*, c. 64. But it is clear from all the expressions used throughout the act, particularly in sections 2 and 12, that by common gaol is meant the county gaol, as distinguished from a house of correction or the gaol of a franchise; and that this is the true meaning of the term appears from statute 5 *Hen. 4*, c. 10. The charter of incorporation which grants this franchise to the corporation of Bath, distinguishes also between the gaol of the corporation and the common gaol of the county of Somerset. The justices therefore, under the 25th section of the 4 *Geo. 4*, c. 64, were authorised to appoint keepers for every prison within their jurisdiction to which that act extended, except the common gaol, that is, the gaol of the sheriff. But the provisions of that statute are now, by the first section of statute 2 & 3 *Vict.* c. 56, extended to all gaols. The justices have therefore a right to appoint the keepers of all gaols but the common gaol, and have therefore the right of appointing the keeper of the gaol of the borough of the city of Bath. But the gaol itself is no longer that gaol of which the bailiffs were the keepers under the charter, for the chaplain is appointed to the new gaol, which is not only a gaol but a house of correction, of which the bailiffs never were the keepers, and which is placed by the provisions of statute 1 *Vict.* c. 78, s. 38, under the regulations of justices not appointed by charter, but acting under the ordinary commission of justices of the peace. If then the justices have the regulation of the gaol, they ought to appoint the officers; *Reg v. Middlesex Lunatic Asylum*. (a)

But it is clear that the town council have not the regulation of the gaol under the 38th section of statute 1 *Vict.* c. 78, but that the regulation of the gaol is committed to the justices. If then the responsibility for the regulation of the gaol should be in one body, and the appointment of the officers in a distinct and different body, difficulty must necessarily arise as to the management of the prison. But, if the justices are not authorised to appoint, in whom is the right vested? Are the bailiffs to be continued for the sole purpose of appointing the gaolers? It is clear that the town council have not the appointment, because they do not appoint the keeper of the gaol, and the bailiffs have ceased to be part of the corporation, and therefore the bailiffs cannot appoint. It then turns on the construction of the 37th and 38th sections of statute 1 *Vict.* c. 78, which will be best satisfied by giving to the justices who have the regulation of the gaol the appointment of the officers, subject to the amount of salary to be fixed by the town council.

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*Erle, Kelly and Cowling* contra.—The town council of the borough of the city of Bath have the right of appointing the chaplain under the 2 & 3 *Vict.* c. 56, s. 15, because they appoint the keeper of the gaol. The bailiffs of the city were the keepers of the gaol under the charter, and they are still existing officers capable of being annually elected by the town council. The Municipal Corporation Amendment Act, 5 & 6 *Will.* 4, c. 76, makes no alteration. The first section only repeals so much of the charter as is inconsistent with that act. The 58th section authorises the town council to appoint such officers as have been usually appointed, and the bailiff is an existing officer, who has duties to perform in connection with the Court of Record and the Court of Pie Poudre. Two bailiffs might be re-appointed next November if requisite. The 61st section gives the appointment of sheriffs only *ex majori cautela*, but, taken in connection with section 58, does not in any manner interfere with the re-appointment of the bailiffs. But the bailiff


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is the keeper of the gaol, and if it were necessary that he should reside in the prison it would only be for the corporation to appoint the gaoler bailiff. But the actual gaoler is but deputy to the bailiffs. If no deputy had been appointed, and the bailiffs had executed the office themselves, there is no question but the statute would operate, and the town council who appoint the bailiffs would be the proper parties to appoint the chaplain. It is impossible to contend that the Municipal Corporation Act interfered with the functions of the bailiffs as keepers of the gaol, but if there were any doubt it is explained by the 65th section, which includes bailiffs by name among the officers there mentioned. The various statutes passed for the regulation of gaols do not interfere with any franchise existing at the time of the passing of the 4 *Geo. 4*, c. 64, but preserve to the owners of franchises the same power of appointment which they possessed before; that statute only applies to the gaols of counties and of the towns named in the schedule. And although section 17 may apply to all gaols, there was no general provision for the gaols of boroughs prior to the 5 *Geo. 4*, c. 85, but that statute was passed, as appears from the provisions in sections 1, 4, 7, 8 and 10, to remedy this, as well as to amend the former act with regard to the classification of prisoners, but it does not interfere with the right to appoint the keeper of the borough gaols. Then statute 2 & 3 *Vict.* c. 56, gives the right of appointing the chaplain to the person who stands in the same relation to the gaol of the franchise as the sheriff does to the county gaol. [*Patteson J.* The question is, what is the meaning of keeper within this act? it may mean gaoler.] Whatever the meaning of the term, the legislature has made no alteration in the right of appointment. The 5 & 6 *Will.* 4, c. 76, s. 116, the 4 *Geo. 4*, c. 64, and the 5 *Geo. 4*, c. 85, form one body of law; but the 2 & 3 *Vict.* c. 56, was never intended to take from the owners of the franchises the right of appointing the gaoler, and to vest it in the borough justices. It has been read as if it simply extended the provisions of the 4 *Geo. 4*, c. 64, to all gaols; but that is not so.

The preamble recites that the laws now in force for regulating gaols and houses of correction in England and Wales, and for the classification, government and instruction of prisoners, require to be amended, and it then enacts that so much of statutes 4 *Geo.* 4, c. 64, and 5 *Geo.* 4, c. 85, as does not extend to the classification of prisoners shall extend to all gaols. But of these two statutes the first relates to county gaols only, the other to borough gaols. The 2 & 3 *Vict.* c. 56, therefore does not apply the provisions of 4 *Geo.* 4, c. 64, to both county and borough gaols, but must be taken as applying the provisions of that statute to all county gaols, and the provision of statute 5 *Geo.* 4, c. 85, to all borough gaols in England then in existence or thereafter to be erected. But in the 5 *Geo.* 4, c. 85, there is nothing to take away the power of appointing the keeper of the gaol from the owner of the franchise and to give it to the justices of the borough, nor is there any provision in the 2 & 3 *Vict.* c. 56, to that effect; on the contrary, the statute clearly contemplates the case of the appointment of the keeper by other persons than the justices. Thus the 16th section speaks of the justices or other persons having the appointment of the chaplain, and the 24th section mentions the persons authorised by law to appoint the gaoler. The 37th and 38th sections of statute 1 *Vict.* c. 78, do not in any way affect the franchise, or the right of appointing the gaoler, they only give further power to the council as to erecting and enlarging gaols, and some powers to the justices of visiting and regulating the officers appointed. But this is consistent with the right of appointment being in another body; the parties who are to regulate the prison would perform their functions as visitors better if they had not the power of appointment. Whoever therefore appointed prior to the 2 & 3 *Vict.* c. 56, has still the right of appointment, for there is nothing in any of the statutes to take it out of the body by whom it has been exercised ever since the charter, nor anything to prevent the appointment of the officer being in one body, and the regulation of the office in the other.

*Cur. adv. vult.*

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Lord DENMAN C. J., now delivered the judgment of the Court as follows :—This was an application for a mandamus to the Bishop of Bath and Wells, and the question raised between the town council on the one hand, and the justices of the peace for the city of Bath on the other, was as to the right of appointment to the office of chaplain for the gaol and house of correction for that borough, the contending parties having agreed to be bound by our decision upon the present application. We have examined the charter of the city and the several statutes referred to in the argument, and we are of opinion that the right of appointment is in the town council of the borough. The rule which regulates such appointment is laid down by the 15th section of the 2 & 3 Vict. c. 56. That section enacted that, “in every borough gaol and house of correction a clergyman of the Church of England shall be appointed to be chaplain thereof *by the same authority by which the keeper is appointed.*” The difficulty has been to ascertain the proper application of the rule.

By the charter of Queen Elizabeth, the corporation of Bath had the franchise of a prison or gaol, and by the same charter the mayor, aldermen and common council were empowered annually to elect two of themselves to be bailiffs of the city for one whole year, and among other duties attached to their office was this, that they should be keepers of the gaol or prison of the city. It appears by the affidavits that, previously to the passing of the Municipal Corporation Amendment Act, it was the usage to elect two bailiffs, that there was a prison in the city with the custody of which they were charged and were used to appoint the actual keeper or gaoler. Since the passing of that act, the town council have annually appointed one bailiff, and he has had the custody of the prison in the same way, discharging the duty as the two bailiffs formerly did by the appointment of an actual keeper or gaoler. Under that act a separate Court of Quarter Sessions has been granted, and a separate commission of the peace. The jurisdiction has been enlarged in local extent, and as to the nature of offences within

the competency of the justices to try. Lastly, the present gaol and house of correction have been erected and are now fit for use.

By the 6th section of the Municipal Corporation Act, after the first election of councillors, the body corporate was made capable in law *by the town council* to do all acts which it lawfully might have done before, and, as there is nothing in the nature or duties of the office of bailiffs as described in the charter which is inconsistent with or may not be modified by the provisions of the statute, it appears to us that the town council would have been warranted in continuing to appoint two bailiffs, and we cannot say on these affidavits that the single bailiff is not well appointed, though it is immaterial to decide that question on the present application. Under the charter it was the duty of the bailiffs to keep the prison. They appear to have had other duties by the charter, from which it may be inferred that they were keepers of the city gaol more as the sheriffs of counties are by law keepers of the county gaol, than as the actual gaolers thereof. This, however, does not alter the legal objection: they might discharge the actual personal duties by the agency of inferior officers, but they were responsible for those officers, and in law are to be considered responsible for the safe keeping of the inmates, and to be the actual keepers. After the passing of the 5 & 6 Will. 4, c. 76, if no Court of Quarter Sessions or separate commission of the peace had been granted, the duties of the bailiffs in regard to the borough prison would have remained unaltered, and, one bailiff only being appointed, he would have been the keeper.

We think the circumstances just stated, and the enlargement of the jurisdiction before mentioned, have made no difference in this respect. The 2 & 3 Vict. c. 56, s. 15, appears to us framed with a view to the existing state of things in every borough, and to the avoiding of all questions of right to appoint chaplains which might have arisen upon reference to the general gaol acts. It vests the appointment

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at once in that body or individual by whom in any particular borough the keeper is appointed. It was argued that the term keeper of the gaol, by reference to the statutes in *pari materia*, must mean the actual gaoler. Seeing that the clause relates to borough gaols only, we are not sure that this is necessarily so; it is not improbable that it may have been used in a larger sense; but, strictly understood, we think the bailiffs or bailiff of this borough sufficiently answer the denomination; they are the gaolers, acting by their subordinate agents.

Nor is this an inconvenient or unreasonable arrangement, for while on the one hand the appointment will be with the town council, with whom must be the power to settle and pay the amount of the salary, the interior regulation and control of the prison still will remain with another independent body, the justices, who will be charged to see that the officer appointed efficiently and regularly discharges his duty, and who are certainly the most competent for such supervision.

We think therefore that the rule should be absolute.

Rule absolute.

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WHITTINGTON v. BOXALL and others.

Tuesday,  
 June 27th.  
 Under an issue, in trespass *quare clausum fregit*, on a plea that the close was not the property of the plaintiff, the plaintiff's possession at the time of trespass is alone in issue, and the defendant cannot set up title to the close, without pleading in confession and avoidance.

TRESPASS for breaking and entering the plaintiff's close.

Pleas: 1. Not guilty.

2. That the said close was not the property of the plaintiff in manner and form, &c.

Issues on the above pleas.

On the trial of this cause before *Taddy* Serjt. at the Sussex Summer Assizes, evidence was given of title in the defendant. The learned judge told the jury that, under the issue raised on the plea of not possessed, the only question was, whether the plaintiff was in possession at the time of the trespass. Verdict for the plaintiff.

*Platt* in the Michaelmas Term following, obtained a rule nisi for a new trial on the ground of misdirection.

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*Thesiger* and *Ogle* shewed cause (a).

*Platt* and *Peacock* contra, in addition to the cases referred to in the judgment, relied upon *Ashby v. Minnit* (b), and *Carnaby v. Welby* (c).

*Cur. adv. vult.*

Lord DENMAN, C. J. now delivered the judgment of the Court as follows:—This was an action of trespass for breaking and entering a close of the plaintiff, called a garden. To this the defendant pleaded, first, not guilty; secondly, that the close was not the close of the plaintiff. Upon the trial, the defendant contended that the close belonged to him, and evidence of title was gone into.

The learned judge before whom the cause was tried left no question of title to the jury, but, as to the second plea, desired them to say whether the plaintiff or the defendant *Boxall* was in possession at the time of the alleged trespass, telling them that property would follow the possession, unless some other proprietor appeared.

The jury found that the plaintiff was in possession, and returned a verdict in his favour accordingly.

A motion for a new trial was made on the ground that the learned judge should not have left merely the question of possession to the jury, but that, as the defendant *Boxall* claimed the property in the garden, the facts necessary to determine that point should have been left to them as well as the question of possession.

Upon shewing cause, it was contended on the part of the plaintiff, that the defendant, under a traverse of the allegation

(a) In Mich. Term last before Lord Denman C. J., *Williams, Coleridge* and *Wightman* Js. (c) 8 A. & E. 872; S. C. 1 P. & D. 98.

(b) 8 A. & E. 121; S. C. 3 N. & P. 231.



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in the declaration that the close was "the close of the plaintiff," was not at liberty to shew title in himself or some other person through whom he claimed, but that under that issue the possession only was in question, and that if the defendant wished to set up a title in himself, or some other person, superior to that founded on mere possession, he should have pleaded specially in confession and avoidance, admitting the possession, but avoiding the effect, by shewing superior title, and this ultimately became the point for our consideration.

Before the new rules, the plaintiff, in an action of trespass *quare clausum fregit*, with the general issue pleaded, was obliged to prove possession at the time of the alleged trespass, and such proof, without any evidence of title or right to the possession, would support a *prima facie* case against the defendant, who was however at liberty, under the plea of not guilty, not only to dispute the possession of the plaintiff in fact, but to shew that as against him (the defendant), the plaintiff had no *right* to the possession, because such right was either in himself (the defendant), or in some person by whose authority he acted. However inconvenient and productive of hardship upon the plaintiff this may have been, by suddenly starting a title upon him of which he had no notice, nor indeed any means of knowing, whether the defendant meant to rely upon title at all, it was nevertheless perfectly consistent with the plea of not guilty before the new rules. That plea was a general denial that the defendant was a trespasser as alleged, and, as he could not be a trespasser upon his own land, he was at liberty to shew that it was his own, in order to make out his denial of being a trespasser.

It was with a view to correct the hardship and inconvenience arising in this and other cases from the latitude of defence allowed under the general issue, that the new rules upon that subject were established, and now the plea of not guilty in trespass only puts in issue the fact of committing the alleged act of trespass, and not the plaintiff's

possession or right of possession, which, if intended to be denied, must be specially traversed.

The plea that the close is not the close of the plaintiff, is not a traverse of the possession or right of possession of the plaintiff in the *terms* of the new rules; but it is a traverse of a material allegation in the plaintiff's declaration, and the effect of such a traverse is to be considered according to the ordinary rules of pleading. As mere possession is sufficient to maintain trespass against any one who cannot shew better title, the plaintiff's allegation, that the defendant broke the close of the plaintiff is satisfied *primâ facie* by proof that the defendant broke a close in the possession of the plaintiff. And this is not only *primâ facie*, but ultimately sufficient against any one who cannot avoid the effect of it by shewing that, notwithstanding the actual possession by the plaintiff, he, the defendant, has a right to it.

Under a plea which merely denies that the close is the close of the plaintiff the defendant is to be considered *primâ facie* at least as a mere wrongdoer, and as against him possession is not merely evidence of title, but actual title, as decided in *Catteris v. Cowper* (a), and *Purnell v. Young* (b).

If then the traverse means more than that the close is not in the possession of the plaintiff, it is larger than the allegation in the declaration which it traverses, and which asserts no higher or better title than is supported by mere possession against a defendant who shews no title whatever in himself, nor any one under whom he claims, and who, for all that appears upon the pleadings, is a mere wrongdoer, if the plaintiff proves actual possession.

If the defendant not only contests the possession in fact, but also relies upon title, in case actual possession is proved by the plaintiff, it is far more consistent not only with the object of the new rules, but with the rules of pleading generally, and with the principles of justice, that his defence

(a) 4 Taunt. 547.

(b) 3 M. & W. 288.

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on the ground of title should be pleaded specially, and not given in evidence under a traverse of an allegation in the plaintiff's declaration, which is satisfied by proof of possession only.

If the defendant contests the *primâ facie* title of the plaintiff, he is at liberty to do so under the plea denying that the close is his, but if he means to set up superior title in answer to the *primâ facie* title of the plaintiff, he should plead in confession and avoidance.

The Court of Common Pleas in the case of *Heath v. Millward* (a), and this Court in the case of *Browne v. Dawson* (b), took the same view of the effect of traversing the allegation that the close is the close of the plaintiff, and seem to have considered that it put the possession only in issue. The counsel for the defendant upon the argument on this case relied very much upon an expression which fell from Mr. Baron *Parke* in pronouncing the judgment of the Court of Exchequer in the case of *Purnell v. Young* (c), and which certainly is at variance with our view of the case. It was however quite unnecessary for the purpose of that decision to give greater effect to the plea denying that the close was the close of the plaintiff than we are disposed to give to it, but the learned judge is reported to have said that, since the new rules, a plea in trespass denying the close to be the close of the plaintiff and concluding to the country, is a denial of the plaintiff's *title* to the close, and allows to the defendant the same liberty of shewing title in himself, or any one else under whom he may claim, that he had under the general issue before the new rules.

But with the greatest respect for the opinion of that very learned judge, who decided that case, we cannot, for the reasons already given, come to the same conclusion.

It does not appear to us to be warranted by any sufficient analogy between the general denial, before the new

(a) 2 Bing. N. C. 98.

(c) 3 M. & W. 288.

(b) 12 A. & E. 624; S. C. 4 P. & D. 355.

rules, in the plea of not guilty, of the defendant's being a trespasser modo et formâ, and a plea traversing only one of plaintiff's allegations.

The same effect cannot in our opinion be given to both, in allowing the defendant not only to contest the possession, which, if proved, satisfies the allegation traversed, but also to avoid the effect of it by giving evidence shewing that the defendant is himself entitled to the possession. This dictum in *Purnell v. Young* (a) is that from which alone we dissent, concurring fully with the decision of that case.

We therefore think that the learned judge who tried this cause was right, and that the rule for a new trial should be discharged.

Rule discharged (b).

(a) 3 M. & W. 288. (b) See *Harrison v. Dixon*, 12 M. & W. 142.

### The QUEEN v. STOWELL.

THIS was an indictment found at the Central Criminal Court, and removed into this Court by certiorari.

The venue in the margin was "Central Criminal Court, to wit." The question was whether an indictment with such a venue, and so removed into this Court, could be tried by a Middlesex jury.

The first count of the indictment stated, that Mr. *Rawlinson*, police magistrate of Marylebone, had committed two persons to Newgate charged with committing a felony within the jurisdiction of the said Central Criminal Court. That the person against whom the felony was committed appeared before Mr. *Rawlinson*, and gave evidence against them, and was bound over to prosecute. That the defendant

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Saturday,  
June 24th.

Where an indictment, which had the marginal venue "Central Criminal Court," and alleged, according to statute 4 & 5 Will. 4, c. 36, that the offence was committed within the jurisdiction of the Central Criminal Court, was removed by certiorari, and tried in Middlesex:

*Held*, that judgment must be arrested, as there was no allegation that the offence had been committed in that county.

The Court refused to remove the objection by entering, *nunc pro tunc*, a suggestion directing a trial at Middlesex.

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within the jurisdiction of the said court, well knowing the premises, &c., and contriving and intending to obstruct the course of justice, &c., afterwards, to wit, on &c., and within the jurisdiction of the said court, unlawfully and unjustly endeavoured to prevent the prosecutrix from appearing at the trial of the prisoners on the charge aforesaid.

The indictment contained other counts, all alleging the place of the offence to be within the jurisdiction of the Central Criminal Court.

The case was tried at the Middlesex Sittings after Hilary Term, 1842, and the defendant was found guilty.

*M. Chambers*, in Easter Term, 1842, obtained a rule nisi to arrest the judgment on the ground that it did not appear from the indictment that there was any jurisdiction to try the case at Middlesex.

*R. V. Richards* in the Michaelmas Term following (*a*) shewed cause.

*M. Chambers* contra.

The argument is fully noticed in the judgment of the Court: *Rex v. Hart* (*b*) was cited in addition to the authorities there mentioned.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—The objection taken to this indictment was, that it did not shew the offence to have been committed in Middlesex, by a jury of which county it had been tried at Nisi Prius in the Queen's Bench.

It had been preferred and found at the Central Criminal Court, and removed by defendant by certiorari into this. The form of the indictment followed the 3rd section of the 4 & 5 Will. 4, c. 36, which enacts that the district thereby

(*a*) Nov. 26, before Lord Denman C. J., Coleridge and Wightman Js.

(*b*) 6 C. & P. 123.

created shall be deemed and taken to be, "in all cases tried before the Central Criminal Court, one county for all purposes of venue, local description, trial, judgment and execution, in all cases not herein specially provided for: and that in all indictments and presentments preferred and tried before the same court, the venue in the margin shall be 'Central Criminal Court to wit:' and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall in indictments *prepared* (a) and tried in the said court, be laid to have been committed and averred to have taken place within the jurisdiction of the said court."

No provision is specifically made either as to the form of the indictment, or the jurisdiction for trial in the case of indictments removed by certiorari into this Court. It was urged that we might read the words "preferred *and* tried," as if they were "preferred *or* tried," and that this case would then be provided for under the former alternative. And, as regards the venue in the margin, this would be so, but it would leave the difficulties which arise as to the trial untouched. In *Rex v. Connop* (b) this Court directed a trial in Surrey, where the offence was charged in the indictment to have been committed, the margin containing the statutable venue, "Central Criminal Court to wit." And we have lately held in *Reg. v. Albert* (c), that the trial of all indictments preferred at the Central Criminal Court, and containing that marginal venue, may be properly tried in the county where it shews the offence to have been committed. But no one of the five counties over which the jurisdiction of that court extends appears in the present indictment.

It was argued that stat. 7 Geo. 4, c. 64, s. 20, might cure the defect, because over an indictment removed by certiorari this Court has undoubted jurisdiction. But it has no jurisdiction for the purpose of trial, for there is no

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(a) Sic.

(b) 4 A. &amp; E. 942.

(c) *Ante*, 89.

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district from which the jury can be drawn, and no officer to whom the process for summoning them can be directed. The Court therefore, which sat under the commission of nisi prius for Middlesex, did not appear by the indictment to have jurisdiction.

We were pressed to take this objection from the record by entering nunc pro tunc a suggestion directing the trial in Middlesex. But we are not satisfied of our power to do this, even if required before the trial: and, if we possessed that power, should be very slow to exercise it; nor can we conceive any circumstances in which we should make such an alteration when first moved to do so after trial. The objection must therefore prevail. The consequence is, that in indictments preferred in the Central Criminal Court, an ordinary venue should be laid for the material facts, as well as that in the margin describing the jurisdiction; and, when such venue may not appear in the indictment, no certiorari should be granted for defendant, except on condition of his consenting to its introduction.

The judgment in this case must be arrested.

Rule absolute (a).

(a) See *Reg. v. Albert*, ante, 89.

Thursday,  
 June 29th.

CARR v. SMITH and another, Executors of LEE.

The accounts  
 of a coaching  
 concern, in  
 which several

**ASSUMPSIT.** The first count of the declaration stated, that the plaintiff, on the 4th day of December, 1836, and persons were interested as contractors with each other to horse the coaches on different portions of the road, were referred at stated periods to a person who adjusted them, and, after ascertaining how much each had received and disbursed, divided the profits among them according to their respective interests, directing those who had money to pay to the partnership, to hand it over to those who had to receive.

In an action for money had and received by one of such contractors against another, an account so adjusted was offered as evidence of the balance due. It did not appear that the account had ever been assented to by the defendant.

*Held*, that, as the account, not having been assented to, could only be binding upon the defendant by reason of some power given to the accountant as a referee, the instrument was an award, and required a stamp.

*Quere*, whether, during the continuance of the partnership, an action was maintainable on such a settlement of accounts, even if it had been assented to.

from thence until the 3d day of October, 1840, was a coach proprietor, and he and the said *Lee*, deceased, and certain other parties, together and amongst each other, during all that time ran certain public stage coaches for hire between Manchester, in the county of Lancaster, and Leeds, in the county of York, and from thence back to Manchester aforesaid, each of the said parties during all that time agreeing respectively with each other to horse the said stage coaches with their own respective horses upon separate and distinct stages of the road between the said places, and in the management and conduct of the said stage coaches each of the said parties respectively, as occasion required, during all that time received the fares, paid for the carriage and conveyance of the passengers and parcels by the said coaches, and made certain disbursements and charges incidental to the running thereof. And it was then agreed between the said parties respectively, that the accounts of the said coaches should be from time to time made up and settled by some person duly authorised by them in that behalf, and the amount of the net profits ascertained, and also the net amount of profits to which each of the said parties was entitled, calculated according to the number of miles horsed by each, and in case the due and proper disbursements and charges made by any of the said parties, and the net amount of profits to which each party was entitled, during any period for which the said accounts were so made up and settled, should exceed the sum received by the said party for fares during the same period, it was to be ascertained and settled in and by the said account what sums each party was to receive, so as to put him or them upon an equal footing with the said other parties, and from which of the said parties he or they were to receive the same.

And thereupon, in consideration of the premises, and that the plaintiff and the said other persons, at the special instance and request of the said *Lee*, had, on the day and year first aforesaid, agreed as aforesaid, the said *Lee* under-

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took to and then faithfully promised the plaintiff, that, if upon any of the said periodical accounts to be so made out and settled as aforesaid, it should be ascertained that the due and proper disbursements and charges made by the plaintiff, and the net amount of profits to which he was entitled during any period exceeded the sum received by him for fares during the same period, and the fares received by the said *Lee* during the same period exceeded the sum which he was entitled to hold, in order to satisfy his due and proper disbursements, and his net amount of profits during the same period, that he the said *Lee* should and would pay to the plaintiff out of such excess such sum as was directed and appointed by such account to be paid to the plaintiff, in order to put or to contribute to put him upon such equal footing as aforesaid with the said *Lee* and the said other parties.

That the plaintiff and the said *Lee* and the said other parties, after the said 4th day of October, 1836, ran the said stage coaches from and to the places aforesaid, upon the said terms, and continued so to do until the 3d day of October, 1840.

That Messrs. *Henry Charles Lacy* and *James Allen* were duly authorised by all the said parties to make up and settle the accounts of the said coaches, and they the said *Henry Charles Lacy* and *James Allen* accordingly periodically made up and settled the said accounts, and on the 25th day of February, 1837, duly made up and settled the accounts of the said coaches for the period from the 4th day of December, 1836, until the said 25th of February, 1837, and upon such settlement it was made to appear in writing, as the fact in reality and truth was, that the disbursements and charges of the plaintiff during the said period amounted to the sum of 78*l.* 6*s.* 10*d.*, and the net amount of profits to which he was entitled for the same period amounted to the sum of 76*l.* 2*s.* 11*d.*, amounting together to the sum of 154*l.* 9*s.* 9*d.*, whilst the sum received by him for fares during the same period amounted to the sum of 95*l.* 10*s.* 8*d.* only. And that upon the said settlement it was also ascer-

tained and made appear, as the fact in reality and truth was, that the fares received by the said *Lee* during the same period exceeded the sum which he was entitled to hold in order to satisfy his disbursements and charges, and the net amount of profits to which he was entitled during the same period, by a sum exceeding the sum of 12*l.* 4*s.* 4*d.* And the said *Lee* was then directed and appointed in and by the said account to pay to the plaintiff the said sum of 12*l.* 4*s.* 4*d.*, in order to contribute to the placing the plaintiff upon an equal footing with the said *Lee* and the said other parties, of which said account and settlement the said *Lee* then had notice, and was then requested by the said plaintiff to pay him the said sum of 12*l.* 4*s.* 4*d.*, so directed and appointed to be paid to him as aforesaid.

The declaration then averred that other accounts for other periods in the declaration mentioned had been made up, by which it was ascertained that certain other sums were due to the plaintiff in like manner.

Breach, the non-payment by the deceased and the defendants.

There was another special count for sums ascertained to be due from the deceased to the plaintiff, according to the settlement of accounts as made up by another person therein mentioned.

There was also a count on an account stated.

Plea, the general issue; and special pleas, traversing respectively the authority of the persons in the declaration mentioned to make up the accounts, and that they duly made them up.

At the trial before Lord *Denman* C. J., at the Yorkshire Summer Assizes, 1842, it appeared that the plaintiff, the deceased, and several other persons, had contracted with each other for the horsing of certain stage coaches in the manner in the declaration mentioned, and the persons therein named were employed to make out the accounts of the concern for certain specific periods as there alleged, the balance from one account not being carried on to any sub-

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sequent account, but each account forming a distinct account by itself. The only evidence tendered to shew that any sum was due, under the contracts, from deceased to plaintiff, consisted of several of these accounts, which were in writing unstamped; and each of them shewed a balance in the hands of deceased, which it directed him to pay to the plaintiff. It did not appear that the deceased had ever assented to the accounts so made out. It was objected, on behalf of defendant, that these documents were awards, and inadmissible in evidence for want of a stamp. It was also objected that the action would not lie, as being an action by one partner against another. His Lordship overruled the objections, reserving leave to the defendant to move to enter a nonsuit. Verdict for the plaintiff.

*R. Hall*, in Michaelmas Term following, obtained a rule nisi accordingly. The argument against the maintenance of the action, as being an action between partners, is not reported, as the judgment of the Court applies to the other point only.

*Wortley* and *Martin* now shewed cause (a). If the account in question was admissible in evidence without a stamp, all the averments in the declaration were proved, and, if they are insufficient, the defendant should have moved in arrest of judgment. The account was not an award so as to require a stamp; there was no matter in dispute, nor had the accountant to exercise any judgment; he had merely to take the items on either side, and state the result. In *Boyd v. Emmerson* (b) a similar point was raised as to the admissibility of counsel's written opinion, by which parties had agreed to be bound, but was not decided. Even if the parties had expressly agreed to be bound by this account it would not become an award within the Stamp Acts, for the stamp is according to the character which an instrument

(a) On a former day in this Vacation (June 26), before Lord Denman C. J., *Patteson, Williams*

and *Coleridge* Js.

(b) 2 A. & E. 184; S. C. 4 N. & M. 99.

bears upon the face of it, and this account does not purport to be binding as an award. In *Sybray v. White* (a), an accident having happened in an old shaft of a mine, the defendant said, that, if a miner's jury were called and should say the shaft was his, he would make compensation. The miner's jury was called accordingly, and found in writing that the shaft was the defendant's. The written finding did not contain any agreement of the parties to be bound by the finding, and was therefore held to be admissible without an award stamp.

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*W. H. Watson* contra. It is not necessary that there should have been disputes on the subject-matter, in order to give this account the character of an award. [Lord Denman C. J. Can this be an award unless the accountant had a binding power?] The accountant in this case was the referee; he had not merely to add figures together; he was selected as a person in whom the parties had confidence to ascertain the facts and state them. Suppose he had ascertained that on a particular day the coach had come in full of passengers, and that nil had been returned in the way bill, would he not have had authority to take the fares into account, although they did not appear on the way bill? [*Patteson* J. This account may not have been intended as a definitive settlement, until assented to by the parties interested.] In *Jebb v. M'Kiernan* (b), a bond was conditioned for the due discharge of the duties of a clerk, provided that such discharge should be ascertained by the inspection of his accounts by J. S., and that the amount so ascertained should be liquidated damages. It was held that the paper by which J. S. had ascertained the amount required an award stamp.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the

(a) 1 M. & W. 435.

(b) 1 M. & M. 340.

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Court as follows:—This was an action by one partner in a coach against the executors of another for money had and received.

It appeared that the accounts of the partnership were referred at stated periods to a person who adjusted them, and, after ascertaining how much each partner had received and disbursed, divided the profits amongst them according to their respective interests, directing those who had money to pay to the partnership to hand it over to those who had money to receive. Such an account had been adjusted by the appointed person in the lifetime of the testator, and was the foundation of the present action. The partnership continued after such adjustment. The verdict was for the plaintiff. A rule nisi for a nonsuit was obtained on two grounds. First, that the adjustment of accounts was an award, and required a stamp. Secondly, that no action will lie by one partner against another on a settlement of accounts during the partnership, but only on a final settlement after dissolution.

For the plaintiff it was contended that the adjustment was a mere statement of accounts, though a final one, and that a statement which is final, quoad the accounts stated, is a good ground of action, as much as if the whole partnership was at an end. The case of *Fromont v. Coupland*(a), and other similar cases, seem to limit the action to a settlement of accounts on a final close of all partnership transactions; but this case does not necessarily raise that question, for at all events the settlement, in order to ground an action, must be one which is binding and conclusive upon the partners. Now it does not appear here that the adjustment and settlement was ever agreed to by all the partners, nor indeed by the plaintiff and the testator; if therefore it were binding and conclusive on them, it must have been so by reason of the power confided to the person who drew it up, and in that case it would be an award, and required a stamp. It would come within the authority of *Jebb v.*

(a) 2 Bing. 170.

*M'Kiernan* (a), rather than within *Boyd v. Emmerson* (b),  
*Sybray v. White* (c), and similar cases.

The rule for a nonsuit must be made absolute.

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Rule absolute.

(a) 1 M. & M. 340.

(c) 1 M. & W. 435.

(b) 2 A. & E. 184; S. C. 4 N. & M. 99.

GREEN v. ELGIE and TOULMIN.

Thursday,  
 June 29th.

**TRESPASS** for assault and false imprisonment. Pleas, by defendant *Toulmin*: 1. Not guilty.

2. That before the said time, &c., to wit, on the 29th day of January, 1830, a certain commission of bankruptcy, under the great seal of Great Britain, was duly issued against defendant *Elgie*, and under which said commission the said *Elgie* was thereby duly adjudged and declared a bankrupt, according to the laws then in force concerning bankrupts, as by the said commission and adjudication duly entered of record according to the form of the statute in such case made and provided appears, and that after the issuing the said commission, to wit, on the 18th day of June, in the year aforesaid, the said plaintiff presented a petition to the then Lord High Chancellor of Great Britain,

By order of the Court of Review it was ordered that the plaintiff should pay certain costs. The party entitled to the costs afterwards petitioned the Court, reciting the above order, and the service of it on the plaintiff and his disobedience to it, and prayed that the plaintiff might be committed to

prison for his contempt of the order.

Thereupon a further order issued from the Court, which, after reciting the petition and the order, proceeded to order that the plaintiff "do stand committed, &c. for his contempt in the said petition mentioned or referred to, and that a warrant do forthwith issue for that purpose."

A warrant afterwards issued, which recited that by the order last mentioned it was ordered that the plaintiff should be committed "for his contempt in the said petition mentioned or referred to," and then directed his imprisonment "until the further order of this Court."

*Held*, 1. That the warrant was no justification for taking the plaintiff in custody, as the warrant referred to the order, in which there was no general adjudication of a contempt, nor any fact found, nor any thing directed to be done by the prisoner to clear himself.

2. That the petitioner's attorney, who had indorsed the warrant with his own name, and who had refused information as to the amount of the costs, when a friend of the plaintiff inquired for the purpose of paying them, was liable in trespass.

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in the matter of the said *Elgie*, praying, amongst other things, that the said commission might be superseded. That afterwards, to wit, on the day and year aforesaid, the matter of the said petition came on to be heard before the then Vice Chancellor, who, after hearing the same, and hearing the counsel of the said plaintiff in support of the said petition, was pleased to order, among other things, that the said petition, as against the said *Elgie*, should be dismissed with costs, and that the plaintiff should pay the said *Elgie* the costs of and occasioned by that application; such costs to be taxed by the Master of the Court of Chancery in rotation, if the parties differed about the same. That the parties differed, &c., and that the costs were taxed by the Master of the Court of Chancery in rotation at the sum of 36*l.* 7*s.* 8*d.*

That afterwards, to wit, on the 20th day of December, 1830, the said plaintiff presented a further petition to the then Lord High Chancellor of Great Britain in the matter of the said *Elgie*, praying, amongst other things, that so much of the said order of the said Vice Chancellor as related to the dismissal of the said first mentioned petition might be reversed. That afterwards, to wit, on the day last aforesaid, said plaintiff presented two other petitions in the said matter to the said Lord High Chancellor. That afterwards, to wit, on the 4th day of August, 1832, the matter of the said several petitions came on to be heard before the said Lord High Chancellor, when his Lordship, upon hearing the same, &c., was pleased to order that the same should be dismissed with costs, to be paid by the plaintiff *Green*, such costs to be taxed by the Master in Chancery in rotation, &c. That the parties differed, &c., and that the costs were taxed by the Master in Chancery at the sum of 33*l.* 17*s.* 9*d.*

That the said several sums remaining unpaid, an order was made in the matter of the said bankruptcy, to wit, on the 16th day of March, 1833, by the judges of the Court of Bankruptcy, forming a Court of Review, by which it was

ordered, on the petition of *Elgie*, that the plaintiff should pay the said several sums of 36*l.* 7*s.* 8*d.* and 33*l.* 17*s.* 9*d.* to *Elgie*, within fourteen days after he should have been duly and personally served with that order.

That the plaintiff was duly and personally served with the said last mentioned order, and that the plaintiff did not pay the said several monies to *Elgie* in pursuance of the said order within the said fourteen days as aforesaid, and that thereupon, to wit, on the day last aforesaid, *Elgie* made a further application by petition to the judges of the said Court of Review in the matter of the said bankruptcy for another order, to enforce and compel the said plaintiff to pay him, *Elgie*, the said two sums of money as aforesaid, whereupon the said Court of Review did afterwards, to wit, on the 31st day of July, in the year last aforesaid, upon the said petition make another and further order that the said plaintiff should pay the said several sums of 36*l.* 7*s.* 8*d.* and 33*l.* 17*s.* 9*d.*, so taxed as costs aforesaid, to *Elgie*, within four days after he should have been duly and personally served with that order, or that, in default thereof, that then the plaintiff should stand committed to his then majesty's prison of the Fleet.

That the plaintiff was afterwards, to wit, on the day last aforesaid, duly and personally served with the said last mentioned order, but that he the plaintiff made default in payment of the said sums of money according to the said last mentioned order.

That the plaintiff having made such default, and he being by reason thereof in contempt of the said Court, *Elgie* afterwards, to wit, on the 19th day of August, in the year aforesaid, presented another petition to the judges of the Court of Review.

The declaration then set out the petition, which, after stating the above proceedings in the Court of Review with respect to the above mentioned costs, and reciting the above mentioned order of the 31st July last, prayed that the plaintiff might be committed to the Fleet, "for his con-

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tempt of the said last mentioned order of the Court of Review." And thereupon the said Court of Review, by an order in the matter of the said bankruptcy, bearing date, to wit, on the 29th day of August, 1833, did order, in the words and figures following, that is to say,

"In Bankruptcy, } Thursday, the 29th day of August,
 Court of Review. } 1833.

"In the matter of *Matthew Elgie*, a bankrupt. Whereas the said *Matthew Elgie* did, on or about the 19th day of August instant, prefer his petition in the above matter to this Court, praying that *William Green*, in the said petition mentioned or described as of, &c., might immediately stand committed to his majesty's prison of the Fleet, for his contempt of the order in the said petition mentioned or referred to, and that a warrant might issue under the seal of this Honourable Court for that purpose, and that the said *William Green* might be ordered to pay to the said petitioner, &c. the costs of the said petitioner of and occasioned by that application; now, upon reading the said petition and the affidavits of the said petitioner, &c., and also the former order of the Court, bearing date the 31st day of July last, this Court doth order that the said *William Green* do stand committed to his majesty's prison of the Fleet, for his contempt in the said petition mentioned or referred to, and that a warrant do forthwith issue for that purpose. (Signed by the Deputy Registrar.) By the Court." Whereupon and in pursuance of the said last mentioned order a warrant was duly issued out of the said Court of Bankruptcy, under the seal thereof, by the said Court of Review, in the matter of the said bankruptcy, directed to the warden of his then majesty's prison of the Fleet, which said warrant is in the words following, that is to say,

"In Bankruptcy, } In the matter of *Matthew Elgie*, a
 Court of Review. } bankrupt.

"Whereas by an order made by this Court in the above matter, upon the petition of the said *Matthew Elgie*, bearing date herewith, it was ordered, that *William Green*,

therein named, should stand committed to his majesty's prison of the Fleet for his contempt in the said petition mentioned or referred to, and that a warrant should forthwith issue for that purpose. These are therefore in pursuance of the said order to will and require you forthwith, upon receipt hereof, to make diligent search after the body of the said *William Green*, and wheresoever you shall find him to arrest him and him safely convey to his majesty's prison of the Fleet, there to remain until the further order of this Court, willing and requiring all mayors, sheriffs, justices of the peace, headboroughs, constables, and all other his majesty's loving subjects, to be aiding and assisting to you in the due execution of the premises, as they tender his majesty's service, and will answer the contrary thereof at their peril, and this shall be to you and any of you who shall do the same a sufficient warrant. Dated this 29th day of August, in the year of our Lord 1833. By the Court. (Signed by the Deputy Registrar.) To *William Robert Henry Brown*, Esq. Warden of his Majesty's Prison of the Fleet, or to his deputy, and these, &c."

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That afterwards, to wit, on the day last aforesaid, he did, under the authority of the said last mentioned order and warrant, and in aid and by command of the said warden, in execution of the same, assault and a little ill treat and did imprison the plaintiff, and keep and detain him in prison, as in the declaration mentioned, the said several orders and warrant being and then and still remaining in full force, as he lawfully might for the cause aforesaid, &c.

Verification, &c.

Replication, protesting all the chancery and bankruptcy proceedings, de injuriâ, &c.

Issue on the first plea and the above replication.

The pleadings in the case of the defendant *Elgie* are not material.

On the trial before *Coleridge J.*, at the Middlesex Sitings after Trinity Term, 1842, it appeared that *Elgie* was an attorney in the country, and *Toulmin* his London agent.

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That *Toulmin* had written his own address on the warrant, under which the plaintiff was taken for non-payment of the costs mentioned in the order of the Court of Review. That while the plaintiff was in prison under the warrant, a friend of the plaintiff called on *Toulmin* for the purpose of paying the costs, and inquired the amount; that a conversation ensued, which afforded some evidence of a refusal on the part of *Toulmin* to give the information desired, such as statements by him, "that he was busy, that he would write in a few days to his client;" and, on the same person coming again in a few days for the same purpose, "that it is of very little use to pay the costs, as I can put him (the plaintiff) in prison again immediately at my own suit," and that the second interview terminated without any statement by *Toulmin* of the amount of costs. The plaintiff was afterwards brought up before *Coleridge J.* by habeas corpus and discharged, on the ground that the warrant was bad.

For the defendant *Toulmin* it was contended that he had merely acted as attorney, and could not be made liable in trespass, and for both defendants that the warrant was a justification. The learned judge expressed his opinion that the warrant was bad, and left the circumstances of *Toulmin's* conduct to the jury, as evidence that he had taken an active part in procuring the imprisonment of the plaintiff. *Elgie* was acquitted, and the plaintiff had a verdict against *Toulmin*.

Platt, in the Michaelmas Term following, obtained a rule nisi to enter a verdict for *Toulmin*, or for a new trial, or for arrest of judgment. To shew that the warrant, if objectionable for not stating the contempt, might be aided by reference to the order of the Court of Review, he cited *Coster v. Wilson* (a); and, with respect to the warrant fixing no definite term of imprisonment, he cited *The Case of the Sheriff of Middlesex* (b).

(a) 3 M. & W. 411.

(b) 11 A. & E. 273; S. C. nom. *Reg. v. Gossett*, 3 P. & D. 349.

Thesiger, Cowling and Corrie shewed cause (a).

Barstow and C. Clark contra.

Cur. adv. vult.

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LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was an action of trespass for assault and false imprisonment against *Elgie* and *Toulmin*. They plead separately the same pleas, not guilty; and secondly, a justification under a commitment by the Court of Review for a contempt. *Elgie* was acquitted. The question is, whether the verdict against *Toulmin* should not be set aside.

A commission had been sued out against *Elgie*, who was declared bankrupt. The plaintiff, a creditor, petitioned to supersede the commission. His petition was dismissed with costs. The proceedings in bankruptcy terminate with the warrant under which he underwent that imprisonment for which he now seeks redress. He was discharged by my brother *Coleridge*, who held the warrant illegal.

The first question we are to consider is, whether at the trial *Toulmin* was proved to have done any thing towards the imprisonment, so as to require justification. This was treated by my learned brother as too clear for argument. It certainly is.

The warrant was written upon by *Toulmin*, as acting in the matter before the imprisonment.

Then was the warrant legal? (His Lordship read the order and warrant.) We are of opinion that it was not. The contempt recited is a contempt *mentioned or referred to in a petition preferred* by defendant *Elgie*, in his bankruptcy, and the order is that the said *William Green* do stand committed to the Fleet Prison for his contempt in the said petition mentioned. The warrant refers to this order as the ground of commitment in which there is no

(a) On a former day in this Vacation (June 23), before Lord Denman C. J. *Patteson* and *Coleridge* Js.

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general adjudication of a contempt, nor any fact found, nor anything directed to be done by the prisoner to clear himself from it. No such order or warrant has ever been held good, and, though this is said to be the form sanctioned by the Court of Review, we have no reason to think that it has ever been upheld in the face of these objections. The form, employed by the Court of Chancery in former times, appears to have been entirely different.

One case was cited, *Coster v. Wilson* (a), to prove that a warrant of commitment may be legal, though made intelligible only by reference to the order on which it is grounded. Here the order itself appears to be bad. In that case the reference was in respect of matters of mere form, by which the jurisdiction might have appeared more distinctly, but the fact of trial and the evidence of all that is wanted for that purpose were set out at large, while in the present case no offence whatever can be collected from the documents.

Supposing, however, the warrant illegal, another question was raised, how far the attorney can be made a trespasser for merely transmitting it, in the execution of his duty towards his client, from the Court from which it came to the officer whom it required to receive the prisoner.

This supposition assumes that the proof of the relation of attorney and client between the two defendants was clear: granting this, what authority is there for the distinction here supposed in favour of the attorney? On examining the books only one such authority will be found, a *nisi prius* case, *Sedley v. Sutherland* (b). We must say that that report is at variance with many well considered cases in banc, of which it will be enough to mention *Braham v. Barker* (c), where the point was learnedly discussed and fully decided, and *Codrington v. Lloyd* (d). The distinction is not between attorney and client, but between both of

(a) 3 M. & W. 411.

(b) 3 Esp. 202.

(c) 3 Wils. 396.

(d) 8 A. & E. 449; S. C. 3 N. & P. 442.

them and the officer whom they employ to execute his known duty in giving effect to the judgments and orders of competent courts. This distinction is just and reasonable, and has been expounded in *Carratt v. Morley (a)*, and several other cases lately decided in this Court. And it is not impossible that an attorney may be in the nature of an officer, handing over papers, which may be afterwards acted upon, with no more concurrence than that of a post-man who conveys a letter. When such is his conduct, this principle may protect him; but, if he deliberately directs the execution of a bad warrant, he takes upon himself the chance of all consequences.

But even this argument would fail to protect the defendant *Toulmin* in the present instance, because it is admitted that an officious interference in such proceedings, from any indirect motive, would divest the attorney of this supposed privilege. Here malice was directly imputed, and that question was properly submitted to the jury. The evidence arising from his writing on the warrant might fall short of this; so might his attendance at the judge's chambers to oppose plaintiff's discharge from custody. But his refusing information as to the amount of costs, which a friend of plaintiff's was ready to pay, led to the protraction of his imprisonment, and furnished cogent proof of such motive.

Rule discharged.

(a) 1 Q. B. 18; S. C. 1 G. & D. 275.

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*Saturday,
June 24th.*

An indictment charging that *A. and B.*, horse dealers, being evil disposed persons, and seeking to get their living by various subtle, fraudulent and dishonest practices, together with divers other evil disposed persons, unlawfully, fraudulently and deceitfully did combine, conspire, &c. by divers false pretences and subtle means, to obtain to themselves from *C.* divers sums of money of the monies of *C.*, and to cheat and defraud him thereof, is not bad on the ground of generality.

A. and B. in concert with each other, falsely pretended to *C.* that a horse which they had for sale had been the property of a lady deceased, and was then the property of her sister, and was not then the property of any horse dealer, and that the horse was quiet to ride and drive, and by these misrepresentations induced *C.* to purchase the horse.

Held, that they were indictable for conspiracy, although the money was to be obtained through the medium of a contract.

Seemle, that they were also indictable for obtaining money by false pretences.

One of two defendants in an indictment for conspiracy died after the venire facias juratores was returnable and before trial; the other defendant was tried and found guilty.

Held, no mistrial, although no suggestion of the co-defendant's death had been entered on the record before trial.

The QUEEN v. KENRICK, sen. and KENRICK, jun.

INDICTMENT for conspiracy, &c. The first count charged that *T. Kenrick* the elder, &c., horse dealer, and *T. Kenrick* the younger, &c., horse dealer, being evil disposed persons, and seeking to get their living by various subtle, fraudulent and dishonest practices, on, &c., with force and arms, at, &c., together with divers other evil disposed persons, unlawfully, fraudulently and deceitfully did combine, conspire, confederate and agree together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves, of and from one *G. W. F.*, divers large sums of money of the monies of the said *G. W. F.*, and to cheat and defraud him thereof, to the great damage of the said *G. W. F.*, to the evil example, &c.

Second count, charging the conspiracy to acquire the money to *Kenrick*, senior, only.

Third count, charging the conspiracy to acquire to *Kenrick*, junior, only.

The fourth count charged that *Kenrick* the elder and *Kenrick* the younger, on, &c., at, &c. unlawfully, knowingly and designedly did falsely pretend to the said *G. W. F.* that a certain carriage, to wit, a carriage called a phaeton, and a certain mare and a certain gelding, which they the said *Kenrick* the elder and *Kenrick* the younger then and there offered for sale to the said *G. W. F.*, had then been the property of a lady then deceased, and were then the property of her sister, and were not then the property of any horse dealer, and were then the property of a private person; and that the said mare and the said gelding were

had been the property of a lady deceased, and was then the property of her sister, and was not then the property of any horse dealer, and that the horse was quiet to ride and drive, and by these misrepresentations induced *C.* to purchase the horse.

then respectively quiet to ride and drive, and quiet and tractable in every respect, by means of which said false pretences *Kenrick* the elder and *Kenrick* the younger did then and there unlawfully, knowingly and designedly obtain from *G. W. F.* a certain valuable security, to wit, an order for the payment of 168*l.*, with intent then and there to cheat and defraud *G. W. F.* of the same, whereas in truth and in fact the said carriage, the said mare and the said gelding, had not then been the property of a lady then deceased, and were not then the property of her sister; and whereas in truth and in fact the said carriage, the said mare and the said gelding, were then the property of a horse dealer; and whereas in truth and in fact the said carriage, the said mare and the said gelding, were not then the property of a private person; and whereas in truth and in fact the said mare and the said gelding were not then quiet to ride and drive, and were not then quiet and tractable in every respect; and whereas *Kenrick* the elder and *Kenrick* the younger then and there well knew that the said carriage, the said mare and the said gelding, had not then been the property of a lady then deceased, and were not then the property of her sister, and also then and there well knew that the same were then the property of a horse dealer, and that the same were not then the property of a private person, and that the said mare and the said gelding were not quiet to ride and drive, and were not then quiet and tractable in every respect, to the great damage and deception of the said *G. W. F.*, to the evil example, &c.

Fifth count the same, except that it charged the property to have been offered for sale by *Kenrick* the elder only.

Both defendants pleaded not guilty.

The case was removed into this Court and tried before Lord *Denman* C. J., at the Middlesex Sittings after Michaelmas Term, 1841. The venire facias juratores was tested in Trinity Term, 1841, and was returnable on the 30th October following. *Kenrick* the younger died on the 1st November. *Kenrick* the elder was tried without any

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suggestion of the co-defendant's death having been entered on the record. Evidence was given of the facts alleged in the fourth count, and of the concert between the two *Kenricks*. Verdict guilty.

Byles, in the following Hilary Term, obtained a rule nisi for a new trial, on the ground that the acts proved did not constitute an indictable offence; also for a venire facias de novo, on the ground that the trial, without a suggestion entered of the death of the younger *Kenrick*, was a mistrial; also for arrest of judgment, on the ground that the first three counts were bad for generality; and the two last for omitting to state to whom the security belonged, and also on the ground that they charged a mere false warranty, which was not the subject of a criminal proceeding.

Thesiger shewed cause (a). 'The fourth and fifth counts must certainly be abandoned on the authority of *Reg. v. Martin* (b), as bad in form, but the counts are good in substance, and the facts stated therein were established in evidence, and are sufficient to constitute the offence charged in the first three counts.

The objection to the first three counts, on the ground of generality, cannot be sustained. *Peck v. Reg.* (c) will be relied on in support of the objection, but the real objection to the indictment in that case was, not that it was too *general*, but that the *particular* allegation contained in it did not necessarily involve a criminal charge. The indictment charged that the prisoners conspired to defraud divers liege subjects, who should bargain with the prisoners for the sale of goods "without *making payment* or other remuneration or satisfaction for the same." Accordingly Lord *Denman* C. J., in delivering the judgment of the Court, observed, "It states that they conspired to deceive and defraud divers of her Majesty's subjects, who should bargain with them

(a) In Mich. Vac. last, (Nov. 26), before Lord *Denman* C. J., *Coleridge* and *Wightman* Js.

(b) 8 A. & E. 481; S. C. 3 N. & P. 472.

(c) 9 A. & E. 686; S. C. 1 P. & D. 508.

for the sale of goods, of great quantities of such goods, without making payment or other remuneration or satisfaction for the same. Now, obtaining goods without paying is, as *Mr. Murphy* argued, not necessarily a fraud: the words might apply to the obtaining goods to sell on commission. Therefore we are of opinion that the count is bad." *Rex v. Gill(a)* is recognised in that case, and the indictment there is precisely the same with the counts now in question. Suppose several persons should agree together to set up a repository for the sale of horses, with the intention of defrauding the public by false representations as to the horses, but without having actually adjusted the particular devices to be resorted to. Surely this would be an indictable conspiracy; yet it would be impossible to allege the particular means of carrying out the conspiracy. In *Rex v. Richardson(b)* also, where an indictment to defraud a party of the fruits of a verdict obtained was held bad, *Rex v. Gill(a)* was referred to and distinguished, on the ground that the object alleged in *Rex v. Richardson(b)* was not necessarily an *illegal* object. Lord Denman C. J. there said, "It is essential that the parties should conspire to do something which the law may contemplate as an illegal act. Supposing particular property were removed from the premises of the defendant, which might lawfully be removed, this could not subject the parties removing such property to an indictment for conspiracy, though the consequence of such an act may have rendered the verdict abortive. The most general form I find recognised, is that in the case cited (*Rex v. Gill(a)*), namely, 'to cheat and defraud a party of his goods and monies.' But there an offence at common law is clearly and distinctly stated, not in figurative and doubtful terms, but in words to which the law assigns a specific meaning." In *Rex v. Eccles(c)*, the indictment merely stated that the prisoners had conspired together by indirect means to prevent one *H. B.* from exercising the trade of a tailor, without setting forth the means

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(a) 2 B. & Ald. 304.
 (A) 1 M. & Rob. 402.

(c) Willes, 583, n., and 13 East,
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used; but the Court overruled the objection, saying that it was sufficient to state the conspiracy and its object. The mere generality of the count in these cases cannot prejudice the prisoner, for he can always obtain particulars of the charge.

Secondly, the facts stated in the two *last* counts, and proved at the trial, constitute an indictable offence, and sustain the charge of conspiracy in the three *first* counts. Undoubtedly, a mere false affirmation by a single individual on the sale of property by him has been held not to be an indictable offence. Thus, if one professes to sell an interest in property and receives the purchase money, the vendee taking the usual covenant for title, and it turns out that the vendor has, in fact, previously sold his interest in the property to a third person, this is not sufficient to support an indictment for obtaining money by false pretences: *Rex v. Codrington(a)*. So, the delivery of less beer than contracted for as the due quantity, has been held not indictable: *Rex v. Wheatley(b)*; the same with respect to the false affirmation as to the weight of coals sold: *Rex v. Reed(c)*. But, in all such cases of contract, the question would have been very different, if the fraud had been effected by several persons in combination. In *Rex v. Pyewell(d)* several persons were charged for conspiring to defraud by false warranty of a horse. They were acquitted, not because a conspiracy to defraud by means of a contract was not indictable, but, because, upon the facts of the case, there was no evidence "of concert between the parties."

The objection, that there has been a mistrial, because no suggestion of the death of the younger *Kenrick* has been entered on the record, seems to be founded on an analogy to civil proceedings, in which a suggestion on the record, according to stat. 8 & 9 *Will.* 3, c. 11, s. 7, saves the abatement which would otherwise ensue from the death of

(a) 1 C. & P. 661.

(b) 2 Burr. 1125.

(c) 7 C. & P. 848.

(d) 1 Stark. N. P. C. 402.

a co-plaintiff or co-defendant. There is no authority, however, for such an analogy ; and, even if the analogy prevailed, it seems that in civil proceedings a death after issue joined need not be suggested in making up the issue, nor till the judgment-roll is made up : (*Tidd*, 725, 9th ed.)

"After issue joined by two defendants, if one of them die, and then a venire facias is awarded betwixt the plaintiff and both the defendants, and so in the habeas corpora and distringas, yet this shall not vitiate the venire facias, &c. to make error ; because, though one of the defendants be dead, yet the other being alive, it is sufficient. And there need be no surmise in judicial writs that one of the defendants is dead ; it is time enough to show it to the court on the day in bank." (*Duncomb's Trials, per Pais*, p. 67.)

"Although a venire facias issued against a dead person, yet one of the defendants being alive, is sufficient, and no cause of error," *Piffin v. Fenton* (a). He referred also to *Rex v. Cohen* (b), *Rex v. Nichols* (c), *Thody's case* (d), *Rex v. Kinnersley* (e), *Rex v. Cooke* (f).

Erle contrà. *Rex v. Gill* (g) was an unprecedented decision and contrary to all principle, and appears to be shaken by *Reg. v. Rowed* (h), where an indictment for committing divers unnatural practices was held bad for generality. In actions for slanderously imputing a conspiracy, a general justification in the form of this indictment would be insufficient, and surely there ought to be as much particularity in an indictment as in a plea. The acts proved did not constitute an indictable offence on the authority of the cases already referred to ; these acts, if done by a single person, would not have amounted to the offence of obtaining money by false pretences. They cannot, therefore, be indictable because done by two persons.

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(a) Cro. Car. 426.

(b) 1 Stark. N. P. C. 511.

(c) 13 East, 412, n.

(d) 1 Vent. 234.

(e) 1 Str. 193.

(f) 5 B. & C. 538.

(g) 2 B. & Ald. 204.

(h) 2 G. & D. 518.

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It is quite an innovation on the principles of criminal law to make a false warranty the subject of an indictment. The falsity would give an action for deceit, as in *Dobell v. Stevens* (a), where the vendor of a public-house, pending the treaty of sale, made deceitful representations respecting the amount of the business done in the house. *Rex v. Turner* (b) shews that an indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going, into a preserve for hares, the property of another, for the purpose of snaring them, though alleged to be done in the night by the defendants, armed with offensive weapons for the purpose of opposing resistance to any endeavours to apprehend or obstruct them; and Lord *Ellenborough* C. J. in delivering the judgment of the Court, said, "I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment." The falsity in this case was not as to any collateral matter, but as to the contract itself. If a false warranty by one is not indictable, how can a false warranty by two persons be so? There is certainly no direct authority to shew this to have been a mistrial, but it seems on principle that the issue which the jury have to try should appear on the record. According to the record, the jury had to try both defendants, although, in truth, they had to try one only.

Thesiger, in reply, referred to *Rex v. Villeneuve* (c).

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was an indictment for a conspi-

(a) 3 B. & C. 623; 5 D. & R. 490.

(c) Cited 3 T. R. 104.

(b) 13 East, 238.

racy, containing five counts. Of these, two were given up (a) by consent for the prosecution, on account of an objection wholly unconnected with that made to the others now to be considered. The third ran in the following form. (His Lordship then read the count.)

The 4th and 5th charged defendants with obtaining money by false pretences, which were set forth.

It was contended, in the first place, that the third count was bad by reason of uncertainty, as giving no notice of the offence charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question, for we have sufficient proof that during that period any combination to prejudice another unlawfully has been considered as constituting the offence so called. The offence has been held to consist in the conspiracy, and not in the facts committed for carrying it into effect, and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose.

This form of indictment was formerly questioned in *Rex v. Gill* (b), and was upon discussion held good. Nor has that decision been overruled. The indictment in *Rex Eccles* (c), stated in a note there, is equally general.

There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings of Courts are aware that there is danger of injustice, from calling for a defence against so vague an accusation; and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The antient form however has kept its place; and the expedient, now employed in practice, of furnishing defendants with a particular of the

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(a) The counts given up were the 4th and 5th. They were given up for a formal defect, as appears *supra*; but it appears from the judgment (p. 218) that they were

good in *substance*.

(b) 2 B. & Ad. 204.

(c) Willes, 583, n., and 13 East, 230, n.

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acts charged upon them, is probably effectual for preventing surprise and unfair advantages.

Doubts have also been expressed how far an indictment for conspiracy may be maintained, where the object of it was of a very trivial nature, or where the whole matter might be thought to sound in damage, not in crime. Lord *Ellenborough*, in *Rex v. Turner (a)*, would not permit parties to be convicted of a conspiracy for effecting so slight an object as a trespass by following the game on another's land. The same learned judge, in *Rex v. Pywell (b)*, stopt the case, on the trial of an indictment for a conspiracy, where the fraud to be accomplished appeared to be such as would more properly be the foundation of a civil action on the warranty of a horse. But if in the case of *Rex v. Turner (a)* the meditated injury, instead of ending with the trespass, had been planned for the purpose of seizing the landowner, or driving him from the country, we have no reason to think that the learned judge would have condemned an indictment for a conspiracy to effect that object. In the case of *Rex v. Pywell (b)* the acquittal was directed, not because an action might have been brought on the warranty, but because one of the two defendants, though acting in the sale, was not shewn to be aware that a fraud was practised. His Lordship said that "no indictment in a case like that could be maintained without evidence of concert between the parties to effectuate a fraud."

Lord *Tenterden* also is supposed to have thrown some doubt on the common form of indictment for conspiracy in *Rex v. Fowle (c)*, but the indictment there departed from the common form, charging a conspiracy "to cheat and defraud the just and lawful creditors of *F.*," but not saying "of their monies," or of anything. This objection could not have escaped that learned judge, though two others only, and those less weighty, are ascribed to him by the reporter, that it does not state what was to be done, or who was to be defrauded. Even that indictment, however, he

(a) 13 East, 228.

(a) 4 C. & P. 592.

(b) 1 Stark. N. P. C. 402.

permitted to be tried, and defendants were acquitted for want of evidence. If they had been convicted, and the judgment arrested, the case of *Rex v. Gill*(a) would have remained untouched. Nor does Lord *Tenterden* say any thing which indicates his dissatisfaction with it.

The indictments in *Rex v. Richardson*(b), *Peck v. Reg.*(c), which were held bad, were satisfactorily distinguished on the argument from that of *Rex v. Gill*(a).

The case was moved and argued for misdirection as well as in arrest of judgment, inasmuch as the jury, it was said, ought to have been told that the evidence established no indictable offence. But this objection is in fact the same as that already stated, on which we have observed. The third count charged a conspiracy to cheat prosecutor of his monies in general terms. The evidence was in effect, that the prosecutor was told by both defendants that the horses in question had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horsedealer, and that they were quiet and tractable, all these statements being absolutely false, and defendants knowing that nothing but a full belief of their truth would have induced prosecutor to make the purchase, as he repeatedly informed them that he wanted the horses for his daughters' use. The conspiracy was made out to the entire satisfaction of the jury, and its object was not to do anything innocent, lawful, or indifferent, but to cheat the prosecutor of his money by false representations.

The 4th and 5th counts charged directly the obtaining of the money by false pretences.

The evidence was, that defendants, in order to induce prosecutor to make the contract of purchase, made the false pretences aforesaid respecting the horses sold, and thereby induced him to buy, and part with the price.

A general question seems here to be raised, whether, if money be obtained through the medium of a contract

(a) 2 B. & Ald. 204.

(b) 1 M. & Rob. 402.

(c) 9 A. & E. 686; S. C. 1 P. & D. 508.

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between defendant and the party defrauded, the charge of false pretences can be sustained. Questions approaching this have been raised in the criminal courts. With some plausibility the thing obtained through the false pretence may be said to be the contract, and not the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay.

This was the ground on which my brother *Littledale* directed an acquittal in *Rex v. Codrington* (a). But that decision was lately much doubted by the judges with reference to a case reserved by the Recorder of London. A person, who falsely pretended that he was an emigration commissioner, thereby induced the prosecutor to enter into a contract with him, and to pay him under it a sum of money. An objection was taken, that the verbal representations could not be received in evidence, as the bargain between them was reduced to writing. But the Recorder admitted the evidence, and the judges unanimously approved of his decision, and the conviction was held good. Hence it follows, that the execution of a contract between the same parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. Generally speaking, indeed, there would be little satisfaction in suing parties guilty of such a proceeding; but, in the greater number of such cases, it is more probable that a contract should intervene in the transaction than otherwise, though many breaches of contract may be of such a nature as to be subject of an action, and not of any criminal proceeding. It is clear that the liability to an action cannot of itself furnish any answer to an indictment for fraud.

We think that in this case the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false, and the money was obtained by their means. These counts therefore are good.

Rule discharged.

(a) 1 C. & P. 661.

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RAWLINS v. JENKINS and others (a).

TRESPASS to a fishery in the river Test. The pleadings, which it is unnecessary to set out, raised the question whether the fishing by the defendants was justified under an immemorial right of common of fishery in the mayor, burgesses and freeholders of the borough of Whitchurch.

On the trial before *Coleridge J.*, at the Hampshire Spring Assizes, 1842, one of the freeholders of Whitchurch was called on behalf of the defendants. It appeared that he, together with some of the defendants and several other freeholders of the borough, had signed the following document:—

"We, whose names are hereunto subscribed, pledge ourselves to support each other, by mutually bearing the expenses of defending *any prosecution* laid against us for fishing in the common water of the river Test, in the parish of Whitchurch, no one person fishing without the knowledge of the subscribers, as agreed in public assembly."

The competency of this witness was objected to, on account of his being a party to the above undertaking, and also on account of his being a freeholder of the borough; but the recent statute, 6 & 7 *Vict. c. 85*, has rendered it unnecessary to report the argument on the latter point.

The learned judge was of opinion that the word "prosecution" had reference to a criminal proceeding only, and consequently that the instrument did not involve any undertaking, on the part of the witness, to contribute to the expenses of the present action. The witness was admitted, and the defendants had a verdict.

Butt now shewed cause (b), and contended that the word "prosecution" must be understood in its popular sense, as

Borough freeholders, claiming a common right of fishery, had subscribed an agreement to support each other in bearing the expenses of "defending any prosecution for fishing in the common water," &c.

Held, on a question arising before stat. 6 & 7 *Vict. c. 85*, as to the competency of a party to the agreement to be a witness in an action of trespass, brought against some of the other parties to it, that he was a competent witness, as the word "prosecution" must be taken to apply to criminal proceedings only.

(a) Decided in Hil. Vac. last (Feb. 9).

(b) The stat. 6 & 7 *Vict. c. 85*, has rendered it unnecessary to

notice any part of the argument except such as related to the construction of the document.

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designating such criminal proceedings as the defendants would have been liable to.

Erle and Smirke contra. The word "prosecution" applies to any legal proceeding, whether civil or criminal. A notice that trespassers will be "prosecuted" for merely walking across a field is in constant use, although the trespass cannot be made the subject of a criminal proceeding. So, even in law language, "pledges to prosecute" were given in civil actions, and they may be terminated by a "nolle prosequi." It is unlikely that the subscribers to this instrument should have intended to exclude civil proceedings, which were the sort of proceedings they had most reason to apprehend. [*Coleridge J.* The witness in question was the first witness, and then the instrument was put in, so that the point was raised without reference to any particular circumstances.] If the instrument is ambiguous, the Court will not construe it as applicable to criminal proceedings, for in that sense it would be illegal.

LORD DENMAN C. J.—The objection was raised on the document itself, in the first instance. I think the word "prosecution" must be taken to have reference to criminal proceedings, which it more properly signifies than civil proceedings.

PATTESON J.—The undertaking should be construed according to its most obvious meaning. The phrase "laying" a prosecution, applies generally to an information before a magistrate, or to some other criminal proceeding.

WILLIAMS J.—I am of the same opinion. Where there is a doubt, we should lean in favour of the competency of a witness.

COLERIDGE J. concurred.

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BRUNE v. THOMPSON (a).

INDEBITATUS assumpsit for tolls. The declaration contained six counts. 1. For tolls for goods passing through the plaintiff's manor, and for their wharfage. 2. For tolls payable as *port duties* to plaintiff, as owner of a certain port, for goods exported from the port. 3. The same for goods imported. 4. For tolls due to the plaintiff as owner of the said manor. 5. For other tolls and port duties, payable to the plaintiff as owner of the port. 6. For divers other sums of money due for certain other tolls, &c.

Pleas: 1. As to the sum of 10*l.*, alleged to be for the passage of goods through the manor, and wharfage, and for money due to the plaintiff, *as being owner of the said manor*, &c., as and for certain tolls, and for other sums of money alleged in the last count of the declaration to be due, &c. to the plaintiff, as and for certain other tolls and duties in the said declaration last above mentioned, payment into Court. 2. As to the residue, non assumpsit.

The plaintiff accepted the 10*l.* in satisfaction of so much as the first plea applied to, and joined issue on the second plea.

At the trial before *Erskine J.*, at the Cornwall Spring Assizes, 1842, the principal question made was, whether the plaintiff was entitled to port dues throughout the port of Padstow, or merely in such part of the port as was within his manor. The jury found that the plaintiff was entitled to 8*l.* 6*s.* 8*d.*, tolls in respect of any part of the port, and not in respect of the manor only. The learned judge thereupon directed a verdict to be entered for that amount on the counts for the port duty, and gave the defendant leave to move to enter a verdict for the defendant, if the Court should be of opinion that the finding of the jury

(a) Decided in Easter Term last (May 1).

on the first count, merely because the plaintiff might have recovered the port dues on the last count, on which a greater sum had been paid into Court than the plaintiff had recovered.

Indebitatus assumpsit; 1st count for port tolls, 3*d.* for manor tolls, 3*d.* for tolls generally. Plea, payment of 10*l.* into Court as to the two last counts, and non assumpsit as to the residue. The defendant accepted the 10*l.* and joined issue on non assumpsit. The contest at the trial was, whether the plaintiff was entitled to a port toll generally, or in so much of the port only as was his manor. The jury found he was entitled to a port toll generally, and that 8*l.* was due in respect of them. Held, as the defendant had expressly guarded his payment of money into Court, so as to make it inapplicable to the port tolls, he could not claim to have a verdict entered for him

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would entitle him to do so, on the ground that the last count, as to which the money paid into Court exceeded the amount found by the jury, included a demand for port dues.

Erle, in Easter Term following, obtained a rule nisi accordingly, and cited *Early v. Bowman* (a), *Kennedy v. Withers* (b), and *Churchill v. Day* (c).

Sir *W. W. Follett* S. G., *Crowder* and *Butt* shewed cause. The cases decided upon the effect of payment into Court before the new rules of pleading are no longer applicable. The defendant guarded his plea of payment into Court so as carefully to exclude any admission with respect to the port dues, and he cannot now say that he has paid money into Court in respect of them. In the cases cited, there was only one cause of action proved.

Erle, *Smirke* and *M. Smith* contrà. The cases cited are still applicable, for the question is still the same in principle, whether money has been paid into Court in respect of any count on which the plaintiff might have recovered, and it is clear that he might have recovered port dues on the last count. The new rules have merely altered the mode of paying money into Court, and not the effect of it.

LORD DENMAN C. J.—The rule cannot be supported, except by technical reasoning, which does not apply to the present state of things. The defendant went to trial expressly to contest the port dues, and he has failed.

PATTERSON J.—It is admitted the defendant went to trial to dispute the right to port dues, and now it is said that he has paid money into Court to satisfy them.

WILLIAMS J. concurred.

Rule discharged (c).

(a) 1 B. & Ad. 889.

(b) 3 B. & Ad. 767.

(c) 3 M. & Ry. 71.

(c) A rule for a new trial was made absolute in respect of other points.

END OF TRINITY VACATION.

MICHAELMAS TERM,

IN

THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,

Lord DENMAN C. J.

COLERIDGE J.

WILLIAMS J.

WIGHTMAN J.

In the Bail Court,

PATTESON J.

WOOD v. CONNOP.

Friday,
Nov. 17th.

ASSUMPSIT by indorsee against drawer of a bill of exchange for 500*l.*, payable in three months, accepted by *A. B.*, and indorsed by defendant to plaintiff, with counts for money lent and on an account stated.

Pleas: 1. That after the bill of exchange had been drawn and accepted, and before it became due, to wit, on, &c., it was indorsed by the defendant in blank, and delivered so indorsed, to wit, to one *W. Chandler*, for a special purpose, that is to say, that *Chandler* should get the said bill discounted for the defendant and for no other purpose, and that *Chandler* had given no consideration or value for the bill. The plea went on to state that *Chandler*, in pursuance of the said special purpose, procured the plaintiff to discount the bill; and that the plaintiff "did jointly with one *Williams*, and not otherwise, discount the bill, and delivered to *Chandler* 200*l.* for the use of the defendant, being the joint money of the plaintiff and *Williams*, as the consideration for the delivery of the bill to them; and *Chandler*, in consideration of the said joint discount, delivered

In an action by indorsee against drawer of a bill of exchange, a plea that defendant indorsed it in blank and delivered it to one *C.* for a special purpose, viz. to get it discounted, and without value, and that *C.* got it discounted by the plaintiff and *W.* jointly, and delivered it to the plaintiff and *W.* jointly, and that there was no consideration from the plaintiff solely for the indorsement or delivery:—
Held bad.

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the bill to the plaintiff and *Williams* jointly, and not to the plaintiff solely or alone, or with the intention of investing him with a sole, separate and exclusive right of action on the bill, severally and apart from the said *Williams*; and that the plaintiff never gave, nor hath the defendant ever received from, the plaintiff solely any consideration whatever for the indorsement or delivery to him of the bill of exchange; and that the only consideration or value which the defendant and *Chandler*, or either of them, received for the indorsement and delivery of the said bill of exchange, was the said discount or advance of money by the plaintiff and *Williams*."

2. As to 200*l.*, parcel of the money in the second count mentioned, and the same sum, parcel of the money in the last count mentioned, that the loan and advance of that sum was the discounting by the plaintiff and *Williams* in the first plea mentioned, &c., and the same as to the account stated.


Special demurrer, to the first plea, assigning for causes that by it the defendant did not positively traverse or deny the indorsement stated in the declaration, &c., and that the plea amounted to a mere denial of the indorsement and delivery of the bill to the plaintiff, as alleged in the first count, and ought to have concluded to the country; that it was argumentative, and did not sufficiently confess and avoid, &c. To the second plea, amongst other causes, as amounting to an argumentative plea of non assumpsit.

Joinder in demurrer.

W. H. Watson for the plaintiff. This is an indorsement in blank, and gives a right of action to any one to whom the bill so indorsed is delivered, *Ord v. Portal* (a), and this indorsement is not denied by the plea; it appears therefore to have come lawfully to the plaintiff's hands. And it is quite consistent with the plea, that the plaintiff may have given full consideration to *Williams*. It is also bad, because

(a) 3 Camp. 239.

it alleges, not that it was not indorsed to the plaintiff, but that it was indorsed to him and another, which is an argumentative denial of the indorsement: *Marston v. Allen* (a), *Adams v. Jones* (b). (The validity of the second plea was not maintained for the defendant.)

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Erle contra. The objection amounts to this, that it is consistent with this plea that the plaintiff may have a right to sue, because he may have acquired it by a subsequent indorsement. But that would be matter of replication. The plea gives the plaintiff colour, admitting that he had a *prima facie* right; but goes on to shew that the cause of action was really in him and *Williams* jointly, and the plaintiff's liability to them jointly. [*Wightman* J. Suppose the bill had been delivered to *Williams* only, instead of the plaintiff and *Williams*, would it have been necessary, to entitle the plaintiff to sue, that he should shew an indorsement from *Williams*? *Coleridge* J. That would be to confound the distinction between general and special indorsement.] *Goodman v. Harvey* (c), *Arbouin v. Anderson* (d). It is also not an argumentative traverse.

LORD DENMAN C. J.—The Court is against you on the first point. The plea states a series of facts quite immaterial to the plaintiff's right to sue.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

Judgment for plaintiff.

(a) 8 M. & W. 494.
 (b) 4 P. & D. 174.

(c) 4 A. & E. 870; S. C. 6 N. & M. 372.
 (d) 1 Q. B. 498; S. C. 1 G. & D. 403.

1843.

Friday,

Nov. 17/h.

In case for the seduction of the plaintiff's daughter and servant, not guilty puts in issue the fact of seduction only, and not the fact of service:

Although the declaration is in the following form:—That the defendant debauched the daughter of the plaintiff, "who then and during all the time aforesaid was and yet is the servant of the plaintiff."

A plea, therefore, traversing the service modo et formâ is not bad as an argumentative plea of not guilty (a).

TORRENCE v. GIBBINS.

CASE for seduction of the plaintiff's daughter. The declaration stated that the defendant debauched and carnally knew *E. T.*, "being the daughter of the plaintiff, and who then and during all the time aforesaid was and yet is the servant of the plaintiff." Plea, that the said *E. T.* was not at the said time when, &c. servant of the plaintiff in manner and form. Demurrer, on the ground that the plea amounted to not guilty, and should have been so pleaded. Joinder in demurrer.

Atherton, for the plaintiff. According to the rules of Hil. Term, 4 *Will.* 4, the plea of not guilty operates "as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." The question resolves itself to this: what is the meaning of the word "wrongful act?" There appear to be two classes of facts which may fall under this designation. The one, where the fact itself, without more, is wrongful; the other, where the fact in itself is indifferent, but the wrongfulness arises from its injurious effect on the defendant. In the first class, the plea of not guilty would in strict reasoning cover nothing but a denial of the fact; in the other, a denial either of the fact itself, or of the wrongful character, i. e. that it could inflict an injury on the defendant. And with this the instances given in the new rules seem to agree. "In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house." That is a case under the second class. The carrying on the offensive trade is in itself indifferent; it is the injuriousness to the

(a) See the form in 2 Chitty, jun. *Precedents in Pleading*, 571, and the observations, *ib.* pp. 617, 644.

plaintiff's occupation which is the foundation of the action; and that is accordingly denied by not guilty. But in the next instance, "in case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the right of way." That falls under the first class. The thing done is one which *prima facie* the defendant had no right to do; the general issue, therefore, merely denies it. Applying this distinction to the present case, as between the defendant and the plaintiff, the fact of seducing the plaintiff's daughter is one which in itself constitutes no ground of action. *Prima facie*, as between those parties, it was no more than seducing any other woman. Its injuriousness arises out of the fact that she is the plaintiff's servant. Then not guilty operates as a denial of that fact. Another rule is, that what is stated by way of inducement is not put in issue by not guilty under the new rules. Here there is no inducement. The relation of master and servant is stated substantively in the declaration. Again, where an action on the case depends on resulting damage, which may or may not have accrued from the act complained of, not guilty puts in issue the damage. The cause of action here is not the seduction, but the damage which may or may not result from it, according as the party seduced has or has not the character of the plaintiff's servant. If this be so, the plea is undoubtedly bad on special demurrer. *Sutherland v. Pratt* (a) is an authority, that a plea, which puts in issue part of the facts covered by the plea of not guilty, is one which puts in issue the whole.

Byles Serjt. contra. The relation of servant to the plaintiff is clearly matter of inducement, though inserted in an unusual manner in the declaration. Any material allegation in the inducement must be specially traversed, even though it be improperly incorporated in the breach: *Frankum v. Lord Falmouth* (b). The other tests sug-

(a) 11 M. & W. 296.

(b) 2 A. & Ell. 452; S. C. 4 N. & M. 380.

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gested are equally fallacious. In case for negligently running down the plaintiff's carriage with a cart, it cannot be shewn under not guilty that the cart was not defendant's; *Taverner v. Little*(a); and yet the damage clearly arose from the defendant's driving, or not at all. It might be as well contended that, in an action for criminal conversation, the marriage might be disputed under not guilty. In fact, the question never would have arisen, had it not been for a *nisi prius dictum* of *Littledale J.* in *Holloway v. Abell*(b).

Atherton in reply. The distinction between the present case and those suggested is, that in this there is nothing of which the plaintiff can *primâ facie* complain.

LORD DENMAN C. J.—I cannot but think that the distinction suggested on the part of the plaintiff, supposing it to be of any validity, would operate against him in the present instance. In the illustration given in the new rules of the action on the case for carrying on an offensive trade, there is nothing which the defendant has not a right to do, or of which any one could complain, except the plaintiff, who is damnified by it on account of his proximity. But seduction appears to me an act *primâ facie* of an injurious character; injurious to some one or other; and the fact of injury to the individual who complains is, therefore, properly put in issue by the special plea.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

Judgment for defendant.

(a) 5 Bing. N. C. 678.

(b) 7 Car. & P. 538.



1848.

TAYLOR v. ROLFE and others.

Wednesday,
Nov. 22nd.

TRESPASS. Plea, not guilty. The defendants afterwards obtained leave to plead *de novo*, and paid 5*l.* into Court, which the plaintiff took out, and replied damages *ultra*, on which issue was joined. At the Spring Assizes, 1841, they pleaded, *puis darrein continuance*, the bankruptcy of the plaintiff. To this plea the plaintiff demurred; and in Easter Term, 1842, judgment was given for him. At the Spring Assizes for Wilts, 1843, a writ of inquiry was executed, when the plaintiff recovered one farthing damages. The Master taxed the plaintiff his costs of suit.

Where a plaintiff in trespass has obtained judgment on demurrer, and, on the trial of a writ of inquiry to assess the damages, the jury give less than 40*s.*, the plaintiff is not deprived of his costs by 3 & 4 Vict. c. 24, s. 2.

Erle, in the ensuing term, had obtained a rule nisi for reviewing the taxation, by disallowing these costs, on the ground that the case was within 3 & 4 Vict. c. 24, s. 2.

W. H. Watson and *Humfrey* now shewed cause. This is a judgment on demurrer; and the plaintiff is therefore entitled to his costs. The statutes, which so entitle him, are not repealed, 8 & 9 Will. 3, c. 11, s. 2, and 3 & 4 Will. 4, c. 42, s. 34, by which, "upon any demurrer joined in any action whatsoever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf." The 43 Eliz. c. 6, and 22 & 23 Car. 2, c. 9, were not held to take away the costs on demurrer given by this act. On the other hand, the 21 Jac. 1, c. 16, s. 6, which takes away costs in actions for slander, where the verdict is under 40*s.*, has the words, "If the jury, upon the trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under 40*s.*," thereby clearly extending its provisions to the assessment of damages on a judgment obtained.

The words of 3 & 4 Vict. c. 24, s. 2, are very different; "If the plaintiff, in any action of trespass, or of trespass on the case, brought or to be brought in any of her Majesty's

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Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall *recover by the verdict* of a jury less damages than 40s.;" and "whether it shall be given upon any issue or issues tried, or judgment shall have passed by default." The case of a jury assessing damages after a judgment on demurrer, under a writ of inquiry, is clearly omitted. *Head v. Baldrey(a)* is an authority to shew how strictly this Court will construe statutes depriving parties of their costs.

Secondly, the defendants have paid in 5*l.* The whole sum, therefore, eventually recovered, through the verdict of the jury, amounted to 5*l.* and a farthing.

Erle contra. (He was desired to confine himself to the first point.) The statute 3 & 4 *Vict.* c. 24, s. 2, after the words cited on the other side, goes on to enact, "unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or *on the writ of trial or writ of inquiry*, that the action was really brought to try a right." This seems to shew that the intention of the legislature was to extend the provision, depriving plaintiffs of costs, to every case of a writ of trial or writ of inquiry. And the words "issue, or issues tried," may well include an issue as to the amount of damages the plaintiff is entitled to. Every case of a writ of inquiry is within the mischief of the statute. Suppose a plaintiff relies on a ground of demurrer altogether beside the real merits, and obtains judgment on this, being a mere technical point: if he proceeds to avail himself of 3 & 4 *Will.* 4, c. 42, s. 34, no doubt he can get his costs; but, if he goes before a jury to assess damages, it is no hardship on him to be subject to the general rule. *James v. Salter(b)* is an analogous decision on the three first sections of 3 & 4 *Will.* 4, c. 27.

Lord DENMAN C. J.—We are all of opinion that the

(a) 11 A. & E. 906; S. C. 3 P. & D. 625. (b) 3 Bing. N. C. 544.

Master has done right, and that his taxation is not to be reviewed. The words in the first clause of the section are general; but they are afterwards restrained by those which follow, "whether it shall be given upon any issue or issues tried, or judgment shall have passed by default." That seems to restrict the effect of the statute to two specified cases. It certainly may be said, by a refined construction, that the sheriff, under a writ of inquiry to assess damages, tries an issue. But such a construction can hardly be applied to a statute like the present, where words well known to the law are used, which must bear their ordinary meaning. We think, therefore, that a verdict on a writ of inquiry to assess damages on judgment on demurrer is not within the act.

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WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

Rule discharged.

The QUEEN v. MARY JOHNSON.

Wednesday,
Nov. 22nd.

PASHLEY moved for a rule absolute in the first instance for an attachment against the prosecutrix, for nonpayment of costs pursuant to the Master's allocatur. In this case a writ de contumace capiendo had issued at the suit of the prosecutrix, which was quashed in Trinity term, with costs, to be paid by the prosecutrix or her attorney. The prosecutrix was a married woman; and the affidavits shewed a demand both on her and her husband. The general rule in the Queen's Bench is, that the rule is absolute in the first instance (a): the only question is, whether this rule applies where the prosecutrix is a married woman.

The rule for an attachment for nonpayment of costs pursuant to a Master's allocatur, is absolute in the first instance, although against a married woman.

Per CURIAM (b)—

Rule absolute.

(a) *Rex v. C. D.*, 1 Chit. R. 723.

(b) Lord Denman C. J., *Williams, Coleridge and Wightman Js.*

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Friday,
Nov. 24th.

On a presentment to the commissioners of sewers, the party charged appeared on the proper day in the court of sewers, and tendered his traverse in writing. The clerk to the commissioners (according to the alleged practice of the court) filed a demurrer to this traverse on the ground of informality. The party charged applied for leave to amend his traverse, which the court refused: and gave judgment against him on the demurrer. On this a rate was made. *Semble*, that the commissioners were wrong in admitting the demurrer to the traverse on the ground of informality; or, at all events, that they should have given the party leave to amend.

But, the judgment on demurrer having taken place in September, 1841, the order to pay the rate in June, 1842, and a distress, levied thereon, in July, 1842, this Court discharged a rule, applied for in Trinity Term, 1843, for a certiorari to remove the presentment, judgment, rate and order, on the ground that the application was out of time.

The QUEEN v. The Commissioners of Sewers of the
TOWER HAMLETS.

A RULE had been obtained on the part of *Michael Scales*, calling on these commissioners to shew cause why a certiorari should not issue to remove into this Court a certain presentment, inquisition, or assessment, made by a jury at a court of sewers for the limits of the Tower Hamlets, excluding Saint Katherine's and Blackwall Marsh, holden on the 10th day of August, 1821, whereby among other things it was presented that the several persons mentioned in the schedules to the said presentment annexed received benefit or avoided damage by the support, maintenance, reparation, reformation and amendment of the sewers in the Hackney Marsh Level; and also all ordinances, decrees and orders thereon, whereby a certain rate was made, assessed and levied on *Michael Scales*, in respect of certain lands and tenements, &c. in his possession and occupation in the parish of St. Mary Stratford, Bow.

The presentment in question was returned by a jury to the commissioners of sewers on the 10th August, 1841, and notice was given in the usual mode that any person intending to traverse the same would be allowed to do so on Tuesday, the 24th following. On that day Mr. *Scales* appeared in court, and tendered the following paper by way of traverse.

"To the Commissioners of Sewers of Hackney, and all others whom it may concern. Gentlemen,—A presentment made to you on the 10th August, 1841, by a jury therein named, amongst other averments states that the houses and lands occupied by me and various of my

tenants and others inhabitants of Old Ford in the parish of St. Mary Stratford, Bow, in the county of Middlesex, either avoid damage or are benefited by a stream designated in such presentment as Hackney Brook Level; and that the said *Michael Scales* and others, their lands and tenements, ought to be rated to such Hackney Brook Level, according to a schedule or valuation set forth in such presentment. I hereby give you notice that I traverse such presentment, and say that such presentment is illegal and unjust in the whole and in every part of it, and therefore I put myself upon a jury of my country, and demand to be heard myself, by my tenants, and also by the inhabitants named in such presentment. *Michael Scales*, Long Hall, Old Ford, 24th August, 1841.

“Among other reasons, I derive no benefit nor avoid no injury from the Hackney Brook Level Sewer: and it is an unequal rate. *Michael Scales*.”

To this traverse the clerk to the commissioners entered the following demurrer:

The Queen v. Michael Scales.

In the Court of Commissioners of Sewers for the Tower Hamlets, excluding St. Katherine's and Blackwall Marsh.

“And as to the plea by way of traverse of *Michael Scales* to the presentment made on behalf of our Sovereign Lady the Queen, by a jury of the county of Middlesex at a court of sewers for the limits of the Tower Hamlets, excluding St. Katherine's and Blackwall Marsh, holden on the 10th of August, 1841, *John William Unwin*, clerk of the said court and of the commissioners of sewers for the Tower Hamlets aforesaid, being duly authorised and empowered in this behalf, on behalf of our Sovereign Lady the Queen, says that the said presentment ought not to be quashed, but ought in all things to be affirmed notwithstanding the said traverse; because he says that the said traverse is insufficient in law; and he shews to the court here the following

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grounds and causes of demurrer to the said traverse, namely, that it does not tender an issue, or pray that the facts therein alleged or any of them may be inquired of by the country; nor does the said *Michael Scales* thereby put himself upon the country as to any fact or facts material to be tried; and no certain issue can be taken, nor can any trial of the merits be had thereon, and the same is couched in vague, argumentative, and uncertain terms, and is calculated to perplex and delay the proceedings of the court, and ought to be quashed and holden for nought."

A copy of this demurrer was sent to *Michael Scales*, with notice that the next court would be holden on the 7th September following. On that day *Michael Scales* appeared, and applied for leave to amend his traverse on payment of costs. This the court refused, and proceeded to allow the demurrer, of which the following entry was made.

"In the Court of the Commissioners of Sewers for the Tower Hamlets (excluding St. Katherine's and Blackwall Marsh). The *Queen* agst. *Michael Scales*. On the 7th of September, 1841, comes the said *Michael Scales* into this court, and says that his said plea by way of traverse to the presentment made by a jury of the county of Middlesex on the 10th August, 1841, is sufficient in law; whereupon the said *M. S.* being present in court here, and having been heard in support of his said plea by way of traverse, and the court having fully considered and deliberated upon the premises, it is considered and adjudged by the court here, that the said plea by way of traverse of the said *M. S.* is not sufficient in law, and that the same ought to be and it is quashed, and holden for nought; and that the said presentment made as aforesaid ought to be and it is confirmed and approved of by the court, and that the said *M. S.* be taxed accordingly."

Upon this a rate was made, which was resisted by Mr. *Scales*, and various proceedings took place, ending in an order on Mr. *Scales* for payment of the rate, 21st June,

1842, and a distress levied on his property on the 25th July, 1842.

The rule nisi was obtained in Trinity Term, 1843.

Sir *W. W. Follett* A. G., *Kelly* and *Willes*, now shewed cause. This is not a case for a certiorari. There is nothing wrong on the face of the proceedings. If the commissioners of sewers unjustly refused to allow the amendment of the informal traverse, mandamus was the proper remedy. Nor can any instance be found where a certiorari has been granted after decree, in order to enable a party to make a traverse. Besides, the commissioners are justices of oyer and terminer within their jurisdiction, and the only difference between one of their presentments and an ordinary indictment, is that the former are made *mero motu juratorum*: *Callis* on Sewers, 165; *Fitz. N. B.* 113 b.; *Com. Dig. Sewers G.* There can be no traverse after a decree. [Lord *Denman* C. J. The objection is that no opportunity was given to Mr. *Scales* to traverse.] He joined in demurrer, and judgment was given against him. The demurrer is quite correct in form, and properly filed by the clerk to the commissioners, *Ramsay v. Nornabell* (a), and see the forms in 4 *Wentworth's* Precedents. The remedy by action was open to Mr. *Scales*.

Erle and *Hurlstone* contra *Birkett v. Crozier* (b) shews that it is doubtful at best whether a party can bring his action without having traversed. There can be no doubt that this was intended as a traverse; at the worst, it is informal only. And when the commissioners enjoy so peculiar a right as that of demurring by their clerk to a traverse of a presentment in their own court, and then deciding on the demurrer, it cannot be lawful for them to demur merely on the ground of informality. It is by no means clear that their decision is not final; that is, whether any writ of error can be brought: *Cullis*, 288; *Commins v. Massam*, 18 *Car.* 1, ib. 290; *March* 197: at all events no

(a) 11 A. & E. 383; S. C. 3 P. & D. 253.

(b) 3 C. & P. 63.

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instance of such a proceeding can be shewn. The commissioners are themselves bound to no legal forms in strictness: *Lord Dunbar v. The Commissioners of Sewers* (a), and therefore neither are other parties in their courts; *Rex v. Smith* (b). [Lord Denman C. J. Is not your application too late?] It might be so, if our objection was one of mere informality on the face of the proceedings, but here it is of a wrong proceeding, by which injustice has been done. If our right to traverse has been denied us, we are not too late. It is a right expressly given by 1 H. 4, c. 12; *Callis*, 216; *Com. Dig. Sewers*, G.

LORD DENMAN C. J.—Mr. *Scales* has lain by so long without pressing his complaint, that the Court will not interfere. If he again conceives himself to be improperly charged, he can then oppose it. The rule must be discharged, but only on this ground: there is in my opinion great weight in the objections to the proceedings of the commissioners.

WILLIAMS J.—It appears to me that Mr. *Scales* ought to have been allowed to amend his traverse, and, if he had taken measures in time, he might have applied to this Court to compel the commissioners to receive his amended traverse.

COLERIDGE J.—I certainly think, as at present advised, that the court of sewers ought to have looked into this traverse, instead of rejecting it on a point of form. But, the more improper their conduct, the more reason for the early application of Mr. *Scales* to this Court for its interposition.

WIGHTMAN J. concurred.

Rule discharged.

(a) 1 Keble, 298.

(b) 1 Vernon, 68.

1843.

The QUEEN v. The GRAND JUNCTION RAILWAY
COMPANY (a).

THE Grand Junction Railway Company, in and by a certain rate made for the relief of the poor of the parish of Seighford in the county of Stafford, on the 6th day of August, 1843, were rated, in respect of the Grand Junction Railway passing through the said parish and land adjoining, on the sum of 1050*l*. Upon appeal duly made against the said assessment, the Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court on the following case:

The appellants were incorporated, and the Grand Junction Railway formed, by and under an act 3 *Will.* 4, c. xxxiv.; (local, personal and public) altered, amended and extended by other acts of parliament, namely, 4 *Will.* 4, c. iv.; 5 *Will.* 4, c. viii.; 5 *Will.* 4, c. ix.; 1 & 2 *Vict.* c. lix.; 3 *Vict.* c. xlix.; which are to be taken to be part of this case. Under these several acts, not only has the line of railway as originally contemplated from Warrington to Birmingham been constructed and opened for public use, but other railways made by other parties from Warrington to Newton, and

The principle, that the amount, on which a railway, when the railway company are themselves the carriers, is to be assessed to the poor's rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the company from the conveyance of passengers, goods, &c. such lessee finding locomotive power, carriages, &c. subject to certain deductions, is not

(a) Decided in Easter Vacation, 1844, (May 10th.)

altered by the circumstance, that other parties also are carriers on the railway, some providing for themselves locomotive power, carriages, stations and watering places, &c. and paying tolls only to the company, and others finding carriages only, and hiring power, &c. from the company.

In such a case, the following was held to be a correct mode of rating the railway company in a parish through which a railway passes, but in which there are no stations or buildings belonging to the company.

From the gross yearly receipts of the company, including both tolls received, and also all profits derived by the company as carriers, were deducted:—

1. A per centage on the capital invested by the company in the purchase of engines and the other moveable stock necessary for their business as carriers.
2. A per centage on the same sum as for tenant's profits and profits of trade.
3. A per centage on the same sum as the annual amount of depreciation of stock beyond repairs.
4. A sum for the company's annual cost of conducting their business as carriers.
5. The annual value of the stations and other buildings rated separately from the railway.
6. A sum for renewing rails, chairs, sleepers, &c.

The several amounts of all these deductions were fixed by agreement.

The residue of the above gross sum was taken as the sum at which the railway might be reasonably expected to let from year to year.

No deduction should be made from the above sum for an annual allowance for goodwill.

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from Crewe to Chester, and long since opened, have been vested in and become the property of the appellants; and these by the provisions of the said acts or some of them now form part of the Grand Junction Railway, and the whole is managed as to accounts and otherwise as one entire business. Over all these railways so constructed and open, and also over the Liverpool and Manchester Railway, between Newton and Liverpool in the one direction, and Newton and Manchester in the other, the appellants themselves exercise the right of being carriers on their own account of passengers and goods, providing for themselves stations or stopping places, locomotive power, carriages, coke, and watering places, and all other things necessary and convenient for conveyance of passengers and goods, and charging for such conveyance reasonable fares and freights, in addition, as regards the said Grand Junction Railway, to the tolls or tonnages which they are authorised by the said acts to take; and by this carrying trade, as well as by the toll, the appellants make profit.

Other parties also exercise the right of being carriers over various parts of the Grand Junction Railway, and amongst others over that part which is in the respondent parish, providing for themselves, without the consent or concurrence of the appellants, and independently of them, (subject however to the control of the appellants under the provisions of the said several acts of parliament, and also subject to the provisions of the several acts of parliament for the regulation of railways), locomotive power, carriages, coke, and watering places, and all other things necessary and convenient for the conveyance of passengers and goods, and separate stations and stopping places adjoining the railway, and the needful branches into or communications with the same; and they, like the appellants, make profits of their trade so carried on by them over the railway; and they pay to the appellants the tolls or tonnage duly fixed by the appellants pursuant to the said acts or some of them, and being the same tolls as formed the basis of the calculations hereinafter mentioned as contended for by the appellants.

A third class of carriers over the Grand Junction Railway hire from the Grand Junction Railway Company locomotive engines, and the use of stations, &c. but find their own carriages; and they likewise make profits over the railway. These also pay to the appellants the said tolls or tonnages, besides a compensation for the use of the power, stations and other accommodations provided for them. The total length of so much of the Grand Junction Railway as lies between Birmingham and Newton is 84 miles, and from Crewe to Chester 21 miles, making together 105 miles; and the distance along the Liverpool and Manchester Railway from Newton to Liverpool is 15 miles, and from Newton to Manchester 16 miles. The length of railway within the respondent parish is one mile, and there is no station, stopping place or property of the appellants, other than the railway itself, in the said parish. The appellants have duly caused toll boards or lists to be made and published, as required by sections 165 and 166 of the statute first above-mentioned. The appellants have also duly kept the accounts of tolls as required by sections 19 and 20 of 1 & 2 *Vict.* c. 56, and section 27 of 3 *Vict.* c. 49, and free access has been afforded to them as required by those acts. The fares and charges for the conveyance of passengers, goods, parcels, &c. by the appellants as carriers, are regulated by the number of miles through which they are carried, as well as by weight, bulk, value, &c., and various other circumstances, in like manner as the fares and charges of other carriers.

The gross sum received by the appellants as tolls, rates, or duties, including both what they receive from other companies or persons using the railway as carriers, and also the gross sum of the tolls, rates or duties of which an account is also kept, calculated upon all the passengers, goods, &c. carried by them for their own profit, added together, amount actually to the sum of 1500*l.* in respect of so much of the railway as lies in the respondent parish, and for the current year of rating, and this is

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the gross produce of the land, which the appellants, if not carriers, or which a lessee of the tolls, rates and duties, would in fact have received as such lessee, however or by whomsoever the carrying business of the railway was conducted. And the appellants contended that this latter sum of 1500*l.* so found, ought to form the basis of any rate upon them in respect of their rateable property in the respondent parish. The gross yearly receipts of the company, including as well the tolls actually received by them as the tolls, fares, freights and profits of every kind derived by them as carriers upon and owners of the Grand Junction Railway and its appurtenances, in all the parishes between Birmingham and Newton, and Crewe and Chester, excluding their receipts over the Liverpool and Manchester and other railways which do not belong to them, but for passing over which as carriers they pay toll in the same way as the independent carriers over the Grand Junction Railway, and also the rents, profits and value of all their stations and other conveniences at and between Birmingham and Newton, and Chester and Crewe, are agreed for the purpose of this case to amount to the sum of 440,366*l.* for the current year of rating; and adopting the principle of a mileage division thereof, that is to say, dividing the same by 105, being the total length of the Grand Junction Railway, the amount is 4190*l.* (and a fraction), in respect of so much thereof as lies in the respondent parish. It was admitted and agreed (subject to the opinion of the Court as to the propriety and principle of each item of deduction), that if the 1500*l.*, that is to say, the amount of tolls is to be adopted as the basis of calculation, then the full net annual value of the appellants' rateable property within the respondent parish will be 712*l.* 10*s.*, being the 1500*l.* minus the following deductions, which the Court of Quarter Sessions find to be reasonable in fact; viz. 20*l.* per cent. thereof as for the tenant's subsistence and profits, regard being had in this case to the extensive amount of responsibility, risk, &c.; 2nd. 2*l.* 10*s.* per cent. as for the collection of the tolls; 3rdly. 350*l.* per mile for the maintenance of

the railway with the works and fences, and for gate-keepers, and also for engineering and police, as to so much of the two latter items as are fairly chargeable on the proprietors of the railway as such; 4thly. 70*l.* per mile for poor rates, highway rates, church rates, tithe commutation rent charge; and 5thly. 30*l.* per mile as for renewing or reproducing those portions of the subject of the rate which are of a perishable nature, such as the rails, chains, sleepers, &c. when rendered necessary by accident or decay. The parish officers adopted, and the Court of Quarter Sessions sanctioned by their judgment, a different mode of arriving at the net annual rateable value of the property of the appellants in the parish. They ascertained the gross yearly receipts of the company throughout the railway as stated above, viz. the sum of 440,366*l.*, and then made therefrom the following deductions, the propriety, principle and completeness of such deductions, as well as the propriety and principle of the respondents' mode of arriving at the net annual rateable value of the rateable property of the appellants in the parish, being referred to the opinion of this Court, and the Court of Quarter Sessions finding such deductions to be reasonable in fact, viz. 5*l.* per cent. as for interest on 255,000*l.*, being the capital necessary for and actually invested by the appellants in the purchase of engines, carriages, and all the other moveable stock necessary for the business of the carriers as conducted by them in manner aforesaid; 2ndly. 20*l.* per cent. on the same sum as for the tenant's profits, and the fair profits of such trade carried on by means of so large a capital and with such large risks. 3rdly. 12*l.* 10*s.* per cent. on the said last mentioned sum as the fair annual amount of the depreciation of such stock, considered to be in the hands of a tenant from year to year, beyond all needful and usual annual repairs and expences. 4thly. 198,962*l.* per annum, being the appellants' reasonable annual cost of conducting their business during the same year, in which their earnings as aforesaid amounted to 4190*l.* per mile in Seighford;

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namely, in the coaching department, wages of guards, conductors, porters, station-keepers, clerks and policemen; repairs of carriages, trucks and horse boxes; horsing parcel carts; oil, grease, &c. for carriages; and duty on passengers, &c. and, in the merchandize department, salaries and wages of agents, clerks, porters, &c.; repairs of waggons, &c.; carriages of live stock expenses; and (in both departments and generally) locomotive power, engine-men and firemen's wages, engineering, repairing and cost of materials, including coke; maintenance of way, repairs of stations and buildings, office and general expenses, including insurance and advertising, charge for directions, compensations, rates and taxes, law expenses, and generally petty disbursements attendant on the several businesses of railway owners and of railway carriers. 5thly. As the stations, offices, stores and buildings, and repairing works and premises throughout the railway, have been and are separately rated in the several parishes in which they are situated, although necessarily used and occupied for the purposes of and in connection with the conduct of the traffic upon it, the respondents further deducted the fair annual value thereof, viz. 9150*l*. And 6thly. 30*l*. per mile as for renewing or reproducing rails, chairs, sleepers, &c. as before. The balance, amounting to the net sum of 135,589*l*., was taken to be the net annual value of the whole railway, independently of the stations and other buildings, &c. rated separately; and the sessions found, as an inference from the above facts, that the railway, and other corporeal hereditaments of the company in connexion with the railway, might reasonably be expected to let to a tenant from year to year at the last-mentioned sum of 135,589*l*., exclusive of the rent of the stations and other buildings rated separately, such tenant being assumed to have the power of using the railway and all its appurtenances, now the property of the company, under the same circumstances as the company, and with no other privileges and advantages than the company now possess. The principle of mileage has been agreed upon by both parties as fair for

the purposes of this rate, both as applied to the expenses and deductions as well as receipts. The net annual rateable value of so much of the railway as lies in the respondent parish is to be taken at 1050*l.* at least, supposing the principle of rating adopted by the parish officers in that case to be just and correct. Of the total net receipts of the company only about 30,000*l.* per annum are received in the shape of tolls from all other parties using the railway on their own account. All the other rateable property in the respondent parish is rated upon an estimate of the net annual value thereof, within the meaning of the Parochial Assessment Act, without directly taking into account any receipts, expenses, or allowances having reference to the amount of actual profits made thereon.

The appellants have not any stations or buildings in the respondent parish. In various parishes along the line of railway, the parties who, as before mentioned, use the railway as carriers, and have stations with buildings and with branches into the railway and other conveniences connected with the railway, are not rated in particular parishes or elsewhere upon or in respect of or with any reference to the Grand Junction Railway, but solely for their stations. The appellants derive no pecuniary profit whatever from their land in the respondent parish, except from the tonnages and tolls, and from their fares and other receipts hereinbefore mentioned, and their trade as carriers, in common with all other carriers over the same; if indeed these latter profits are to be considered as profits arising from the land, which the appellants contend that they are not. The appellants also contend that, even supposing the rate to be founded on a just principle and proper basis, the deductions allowed by the respondents do not include all the items necessary to bring out the net annual value, that is to say, the rent at which the appellants' rateable property might reasonably be expected to let from year to year; amongst which omitted deductions, the appellants instance by way of example an annual allowance for goodwill.

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The Court of Quarter Sessions adopted the principle of rating and the deductions contended for by the respondents, as furnishing the net annual value of the appellants' rateable property, pursuant to the Parochial Assessment Act, and confirmed the rate accordingly; but on the application of the appellants granted a case for the opinion of her majesty's Court of Queen's Bench on the several questions hereinbefore raised and stated; the Court of Queen's Bench to have the power of amending, or of quashing, or otherwise dealing with the rate, as they may deem right.

The case was argued in Michaelmas Term, 1843 (*a*), by

Kelly and *Smirke* for the respondents, and

Sir *W. W. Follett* S. G. and *M. D. Hill* for the appellants.

The Court having expressed a desire for further argument, the case was again argued on a concilium in Hilary Term, 1844 (*b*).

Kelly, for the respondents, relied on *Reg. v. The South Western Railway Company* (*c*). The differences of fact between that case and the present are, that in the present case there is a real competition of carriers on the line, such as was provided for by the act of the South Western Company also, but deemed by the Court to be in that case practically impossible: and, consequently, that a part of the profits of the company in this case actually arises from tolls paid by other carriers. There is also a maximum for fares as well as tolls in this case, by 3 & 4 *Will.* 4, c. xxxiv. s. 156. These differences in no degree affect the general principle of the former case. On the contrary, this state

(*a*) November 15th, before Lord
Denman C. J., *Williams*, *Cole-*
ridge and *Wightman* Js.

Denman C. J., *Patteson*, *Cole-*
ridge and *Wightman* Js.

(*c*) 1 Q. B. 558; S. C. 2 G. &

(*b*) January 17th, before Lord

D, 49.

of things is foreseen, and expressly determined by anticipation. "It would be no answer to say, that by law the railway is a highway; that all the world may carry goods and passengers on it; that it is an accident that the company alone monopolise their trade; and that their monopoly may cease to morrow. These circumstances, so far as they lessened the value of the buildings and lands, would be proper to be taken into account as to the quantum of the rate; but they would not affect the principle (a)." In accordance with that view, the annual value of the buildings and lands is here estimated by the whole profits of the company, subject to the proper deductions; compounded as those profits are of the fares received by the company on travelling and carrying in their own carriages, and the tolls received from other carriers for the use of their railway. The result is the net profit which a tenant would make, supposing him to rent the railway of the company, deducting tenant's profits, and also those profits which belong to the trade of carrier, and do not arise from the land itself. No other satisfactory mode can be pointed out of arriving at the result, it being always understood, that the deductions specified in the case are deductions made by consent, the whole of them not sufficing to bring the rateable subject below the assessment at which the parish had set it; not that this Court is asked to pronounce an opinion, whether all these deductions could in reality be justly claimed by the company. The deduction claimed in respect of what is termed "goodwill" is inadmissible; the quality so termed is not, in reality, goodwill, but a certain advantage annexed to the premises which are the subject of the rate, and raising their value. *Coutts's* banking-house is not rated in respect of the profits made in the banking business carried on there; but this is because the incoming tenant would not come also into any of those profits. [*Coleridge J.* He would gain something by the usage of resorting to the house; he would make more by it as a

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(a) 1 Q. B. 584; S. C. 2 G. & D. 72.

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banking house than as a private residence.] If so, that circumstance does add to the rateable value of the house, and makes the case resemble *Rex v. Bradford* (a), *Rex v. The Proprietors of the Liverpool Exchange* (b), and similar cases, where a building, which, by reason of certain factitious advantages altogether extrinsic to the building itself, such as an exclusive legal privilege which is attached to it, becomes of more value when employed for a particular purpose than it would be when employed for any other, is assessed according to that additional value. The goodwill of a business is that which attaches, not to the premises, but to the connexion. Suppose one lets to another his place of business, with the goodwill of his business; if that good will is independent of the premises; if the lessee would have enjoyed the advantage of that good-will, equally, if he had taken the business by itself, and taken premises in another locality, then such goodwill would clearly not be the subject of rating. If, on the other hand, the incoming tenant takes by the demise not only premises of a given value regulated by size, situation, &c., but also premises to which a particular value has become attached, insomuch that, if he were to carry on the same business elsewhere, he could not make so much by it; it would be difficult to contend that this advantage, improperly termed by the name of goodwill, is not the subject of rating. And it is clear that, in the present case, the additional profit, which the appellants seek to deduct under the name goodwill, attaches to the premises themselves, not to the business carried on upon them, independently of those premises.

M. D. Hill, for the appellants, contended that the net amount for which the company was rateable was to be calculated on the tolls only, which would be received by the company, if other parties conducted the carrying business, the remainder being, strictly, profits of trade; and that, without impugning the decision in *Reg. v. The*

(a) 4 Mau. & S. 317. (b) 1 Ad. & El. 465; S. C. 3 N. & M. 550.

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London and South Western Railway Company (a), it might fairly be assumed that that judgment proceeded on the fact that the company then in question had in reality, in the opinion of the Court, exclusive occupation of the line; for, although by the acts of parliament the line was open to other carriers, yet none in fact used it, and the Court considered that the regulations respecting the possible user by other parties were merely illusory. Here, the facts found by the case are very different; the line is not only in point of law, but in fact, open to competing carriers; there is no exclusive occupation by the company; and the tolls, to whatever they may amount, form a sum actually received by the company, not a mere imaginary division of the general profits, as they were thought to be in the instance of the London and South Western Company. It was argued, in the South Western Railway case, that the company had an interest in reducing their tolls to a minimum, and would, no doubt, so act, if the tolls were made the criterion of rating. In the present case the leaning of the company must be the other way, inasmuch as the higher the toll, not only the greater the profit derived by the company from the use of the railway, but the less the danger of effective competition from other quarters with themselves as carriers. Under these circumstances, the case might be fairly brought within the general principle of *Rex v. The Trustees of the Duke of Bridgewater (b)*, which is not only admitted but confirmed in the South Western Railway case, that the occupiers of a canal, who are also carriers, are, nevertheless, rateable according to the tolls only.

The inequality of any other basis is evident from the following considerations. Two classes of carriages convey passengers and goods on this railway, those which belong to the company, and those which belong to competing carriers. Each class earns in reality the same amount of profit to its owners; the fares payable by travellers in each are the same, the expenditure similar, the remuneration si-

(a) 1 Q. B. 558; S. C. 2 G. & D. 49.

(b) 9 B. & C. 68; S. C. 4 M. & R. 143.

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milar, and the same amount of tolls is charged on each, such tolls having been estimated only with respect to the first mentioned class, and actually paid with respect to the other; yet, if the principle of *Reg. v. The South Western Railway Company* is extended to this case, these profits, similar in nature and amount, will become the subjects of entirely unequal rating. In respect of the profits earned by the company's own carriages, they will be rated to an arbitrary extent, fixed by analysis, and called the net rent. In respect of the profits earned by the carriages of other owners, the company will be rated to the extent of the tolls only, and no one will be rated for the remainder. The profit returned by the land is the proper subject of rating. It is the foundation of the argument on the other side, that the payments made by those who are conveyed, or whose goods are conveyed by the railway, are the source of the profits derived by the railway company from their occupation of the land. Every fare taken for travelling through the parish is taxed to such or such an amount for the poor's rates of the parish. Consequently, on the principle contended for by the respondents, a traveller going by one of the company's carriages pays one sum towards the rate; a traveller going by another carriage, not the company's, pays a different and a less sum. The first pays a sum calculated on an examination into the expenses and profits of the company; the second pays simply his proportion of a rate fixed according to the tolls paid, by the owner of the carriages in which he travels, to the company, and nothing more. Again, it is found that the present company carry passengers on their own line, and also on the Liverpool and Manchester line, which belongs to another company. On the latter they pay tolls to that company. Therefore a carriage of the Grand Junction Railway, as far as Manchester, pays, let it be said, a penny a mile to the poor's rates; as soon as the same carriage, with the same load, has passed Manchester and is on the Liverpool line, it pays a halfpenny a mile only, because the

rate upon that portion can be assessed upon the tolls only.

These considerations shew that the principle contended for cannot be carried out without great and obvious inequality; and the reason is, because it is based on an erroneous supposition. That supposition is, that a demise of the railway (such as for the sake of fixing the net rent is imagined to take place) would carry with it the exclusive right of conveying passengers. It would not do so. It would carry the right to receive tolls, and that only. The company might continue to carry themselves, and pay tolls to their tenant; the tolls would be all which the tenant would receive, or which could form the subject-matter of a rate upon him. This position is almost admitted in the judgment of the Court in *Reg. v. The South Western Railway Company (a)*, but the supposition of a railway "practically open to rival carriers," being there held an absurdity, it is treated as beside the question.

But supposing that the company were not only to demise their railway, but were to agree, by express covenant, to transfer their existing trade (so far as they could influence their customers) to their lessee, and were also to bind themselves not to act again as carriers; the imaginary tenant would then, of course, pay an increased consideration for his demise. He would be willing to pay, first, as much as the tolls were worth; secondly, and in addition, as much as the business of the company would be worth to him (leaving him tenant's profit). But these two portions of the consideration would evidently differ in character, and could not with accuracy be classed under the same denomination. The latter would really be a payment for the advantage which the tenant derived from the company's withdrawing from competition with him; a payment for goodwill, to employ the term which seems most nearly applicable of those in common use.

That a payment for goodwill is something essentially dif-

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(a) 1 Q. B. 579; 3 C. & D. 68.

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ferent from rent is evident. Suppose a tenant in possession of premises, for which he pays the ordinary rent to his landlord, and in which he carries on a profitable business; suppose him to underlet the premises, *with the goodwill of the business*, to an under-tenant; suppose the first tenant to continue to pay the rent to the landlord, and, moreover, all outgoings in the shape of rates and taxes. What would be left for him to receive from his under-tenant? An annual payment, which is indeed comprehended in popular language along with the other ingredients which make up rent, but which is in reality a payment for *goodwill* and nothing else. And it is clear that, in the supposed case, the rate would be assessed on the annual amount paid by the first tenant to the landlord, and not on that amount *plus* the goodwill.

Nor are the decided cases contrary to this position. There are cases in which an exclusive privilege attached by law to premises, whereby a particular business could be carried on in them only, or, which appears to be the same thing, exclusive advantages possessed by particular premises for the carrying on of a particular business, have been held the subjects of rating. The canteen case, (*Rex v. Bradford(a)*), and *Rex v. The Proprietors of the Liverpool Exchange(b)*, are instances of this kind. But, without considering at present how far those cases rest on sound principles, they do not at all militate with that now contended for. In these and all such cases, the additional advantage was an incident necessarily attached to the premises. It was by reason of his possession of the premises, and for that reason only, that the occupier enjoyed the advantages. Goodwill is something essentially distinct. It is an advantage attached, not to the premises, but to the business carried on upon the premises, which business may pass from hand to hand by agreement, and may be made the subject either of purchase or annual payment, but not in any case of an assessment for the purpose of rating.

(a) 4 Mau. & S. 317.

(b) 1 Ad. & El. 465; S. C. 3 N. & M. 550.

The truth of this position may be tested in another manner. The net value of houses, shops, and similar property is easily ascertained for rating purposes, by taking the actual rent, or ordinary rent of similar property, as the criterion. When it is desired to ascertain the rateable value of canals, railways, waterworks, gas works, and similar property, there being no market price whereby to form the estimate, a similar criterion is to be arrived at by analysis; such is the process which has been adopted in the present instance by the respondents. Now, if this analysis be correct, it ought, if applied to houses, shops, &c. to work out the same result as the ordinary test of the rent. The rateable value of a farm or shop, ascertained by making precisely the same deductions and allowances from the gross receipts of its occupier as are made in the present instance, ought to coincide with the rateable value as estimated by the rent. But it would not do so. The ultimate remainder, ascertained by analysis, would exceed the rateable value ascertained by the rent. This the instance just adduced in illustration clearly shews. If therefore the principle of rating contended for were applied to shops, this consequence might follow. One shop, where a flourishing trade was carried on, would pay an enormous rate, while another, which was a losing concern, might pay nothing; the rents of the two remaining the same. In the same manner, it may occur that the proprietors of a railway, not used by other carriers than themselves, may run trains upon it at a present loss, in the hopes of creating a traffic which will ultimately remunerate them. But, if the principle of rating now contended for is adopted, such a railway, though occupied for purposes of gain, would pay no rate at all. The mode of rating for which the respondents contend is therefore in conflict with two well established principles; first, that the land is to be rated according to its productiveness as measured by its rent, without regard to the profitableness of the trade carried on in it; and, secondly, that the land, if occupied for purposes of gain,

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must be rated, although the occupation may in fact entail a loss on the occupier.

The appellants therefore contend, that the principle of *Reg. v. The South Western Railway Company (a)* is inapplicable in this case, and that the assessment should be on the tolls alone; but that, if that case be held an authority against them, then a further deduction, besides those allowed, ought to be made from their receipts for that portion of the imaginary rent paid by the supposed tenant, which would in reality be a payment for goodwill only.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This case of appeal against a poor's rate was argued in Michaelmas Term last, and again on a concilium in Hilary Term, and has been heard by all the members of the Court. Independently of certain questions of detail, which we will consider hereafter, the main argument of the appellants was directed to shew that this case was distinguishable from that of *Reg. v. The London and South Western Railway Company (a)*, in points which went to the principle of the judgment in that case; while the respondents contended that the two cases were in principle the same, and that that judgment must govern the Court in this. It is necessary therefore in the first place to compare the two cases. If they shall be found to be different in material circumstances, the principle of that decision may lead to a contrary one in this; at all events, that decision will not bind in the present case: if they shall be found to be substantially the same, it may be necessary to consider whether our own reflection, or anything urged in these arguments, should induce the Court to depart from the former decision.

In that case the facts found (and it must never be forgotten that the propriety of a poor rate can only be determined with reference to the facts found to be actually

(a) 1 Q. B. 558; S. C. 2 G. & D. 49.

existing when it was made) were, that the company were in the sole and exclusive occupation of the railway, warehouses, stations and landing places, and, being so, were solely and exclusively carrying on a large business as carriers thereon; that although the legislature had, under certain limitations, made the railway a highway, and given to all the liege subjects under these a right to use it as such, either as carriers or for individual travelling, and in such case provided for the payment of tolls to the company, yet, in fact, no one having availed himself of the right, nor, as then appeared to us, having the power of doing so conveniently or effectually, no tolls were in fact earned. To this state of facts we applied the established principles of rating; that the rate is to be on the occupier in respect of the beneficial nature of his occupation; in estimating which as to amount, or, to put it in other words, in ascertaining how much net rent such or such an occupation may be expected to command, parish officers are to consider not drily and only what would legally pass by a demise of it, but, all the existing circumstances, whether permanent or temporary, wherever situated, however arising or secured, which would reasonably influence the parties to a negotiation for a tenancy, as to the amount of rent to be asked or given. We therefore thought it impossible in that case to separate the three or four miles of railway within the respondent parish from the whole line running through many other parishes; or that whole line from the warehouses, stations and landing places; or these again from the peculiar conveniences which a tenant would have for carrying on, as occupier, a lucrative business, if not the effective monopoly which the provisions of the act appear to give to the occupier for carrying it on. What under the act was possible by law—what in point of fact might be in future, however near, we thought immaterial as to the principle, though very fit to be taken into account when making the calculation as to the quantum; but in principle the parish officers were to look to the actual state and value of the occupation.

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In the case now under consideration, there are some facts entirely different from those we have just mentioned; the case finds that other parties, as well as the appellants, exercise the right of being carriers over various parts of the railway, including therein that part of it which is within the respondent parish, providing for themselves, independently of the company, (subject however to its control under the acts of parliament), carriages, fuel, and all other things necessary and convenient for conveyance of passengers and goods; and separate stations, and the needful branches into or communications with the railway. These make profits of their carrying trade as do the appellants; and pay them the tolls, which they have fixed under the powers given them by their acts.

Besides these, another class of carriers hire from the appellants engines and the use of stations, landing places, &c., but find their own carriages. These also make profits of their carrying trade on the railway, and pay to the appellants both tolls, and a compensation for the use of the engines, stations, and other accommodations provided for them.

As the appellants receive tolls from these two classes of carriers in respect of the goods and passengers conveyed by them on the railway, so they keep an account, as directed by their act, of the tolls which would have been produced by their own conveyance of such goods and passengers, if not upon their own account. These, with the compensation above mentioned, form the total produce of the land which the company, if not carriers, or a lessee of the railway, carrying on no traffic upon it, would receive; and, upon the aggregate of these alone, after due deductions made, the company contend that the rate ought to be imposed. We understand them, though it is not precisely so stated, to admit the principle of considering the whole line as entire, and to arrive at the exact sum at which they contend the rate on the respondent parish should be fixed, by a mileage division of the whole length: a principle very

convenient in itself, and rightly adopted by consent. It is unnecessary, after this statement, to point out the difference in fact between the two cases, but we cannot perceive how this difference bears upon the principle on which the present rate is to be examined or which governed the Court in the former decision ; for that proceeded not upon speculations as to what might be in future, but expressly on the then existing state of facts. Each of the two companies must be rated in respect of the occupation of the land ; one of them derives no benefit from that occupation, except by carrying on upon the land the business of conveying goods and passengers ; the division of that profit into tolls and fares we think merely nominal ; the other, in addition to this mode of profitably occupying, also derives a profit from allowing others to carry goods and passengers on the land also ; and this latter profit is properly called tolls. Still, in both, the inquiry must be the same ; what is the value of the occupation, from whatever source derived ? In neither can the profits of trade, as such, be brought into the rate ; but, if the ability to carry on a gainful trade upon the lands adds to the value of the land, that value cannot be excluded merely because it is referable to the trade. Suppose a house occupied by a private family to-day, which, having great advantages of situation for the purposes of trade, is turned into a shop to-morrow, and in consequence lets for double or treble the former rent, would not the rate be properly increased in proportion ? Could it be objected, that to do so was to rate the profits of trade ? Again : supposing that the occupier was to let out different rooms to other persons carrying on the same trade as himself, and this mode of occupying was still to increase the value of the house to let ; would this at all vary the principle on which he was rated, though it might increase the quantum ? Or, lastly, supposing that, instead of this species of underletting being at the option of the occupier, all persons using the same trade had a right by some statute under certain restrictions to carry it on in the different rooms of

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the house, paying a large compensation to the occupier; would not the principle of the rate be still the same—would it be material to inquire how the occupation became more valuable, except, it might be, for making greater or less deductions, which the nature of the occupation might make just? We may all remember when the large premises in Soho Square, now used as a bazaar, were occupied as private residences; the present mode of occupation probably increases the rent; but whether one man, being the tenant, alone carried on the various trades now exercised there, or sold goods himself at part of the stands, and let out the others, and so derived his profit in part directly from trade, and part from the rent paid him by traders, or let out all the stands, and so earned no profit but from the rents paid him by traders, the result would be in either case exactly the same; the overseers could only inquire what was the fair rateable value of buildings so occupied. Nor, as we have said before, could the inquiry be at all affected if the occupier of the bazaar held it under some statutable licence, which compelled him to allot his stands to all persons, paying certain rents, and submitting to certain regulations.

But it is said that, in the cases supposed, all is referable to the occupation under the supposed lease. That conveys the exclusive dominion; and thence flow entirely the means of making the profits. We have in truth already given the answer to this; but it will be plainer, if it be observed that there is a fallacy in confounding that *which the lease conveys a legal title to, and that which it gives the lessee the means of doing, or enjoying*. No two things can be more distinguishable; and it is the latter which regulates the rent a tenant will give, and not the former. Suppose two estates of equal size, and in all respects of equal fertility; but one is surrounded by excellent roads; or has a canal near to it; or is near to a large market; and the other is without these advantages. Of course the rent and the rateable value of the one will be larger than of the

other; yet the tenant would take no more by the lease of the one than of the other; the lease would give him no legal title which he had not before to use the roads, the canal, or the market. Or suppose a more peculiar case. A. the owner and occupier of Blackacre, and having the command of a stream of water, which he can turn over Whiteacre, on that account desires to rent it. To him it will be more valuable than to any other occupier, because he can fertilise it at little expense; he will therefore give a larger rent than any other person; yet by the lease he would take no more than any other person, though he ought undoubtedly to pay a higher rate. Apply the principle of these cases to the railway of the appellants. It is quite true that, if they were to let it to a tenant, the lease would convey the land and railway only, and give a title to the tolls only; but the lessee would undoubtedly consider the facilities and advantages which the occupation as tenant would afford him for carrying on a lucrative trade as carrier; and, in whatever proportion that consideration would increase his rent, in the same, after due allowances, would his rate be raised also.

Two propositions are equally true; that the rate is not to be imposed in respect of the profits of trade; and that it is to be imposed in respect of the value of the occupation. And two propositions that are true, and applicable to the same subject-matter, cannot be inconsistent. And we think the respondents in the present case, by the scheme they propose, have shewn that they are not so. The gross yearly receipts of the company, as occupiers of and carriers on the railway, must at least *include* the proper subject-matter of the rate; they have therefore taken a sum agreed to represent them, as the first point to start from; they then assume an amount of capital employed in the trade; and deduct from the former sum two per-centages on the latter for the interest of this capital, and the profit which ought to be made on it; and a third, for the depreciation of stock, beyond usual repairs and expenses.

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Fourthly, they deduct from the gross receipts the annual costs of conducting the trade. Fifthly, they deduct the annual value of all the land occupied by stations, &c., and elsewhere rated. And, sixthly, a sum per mile for the reproduction of rails, chairs, sleepers, &c. These deductions, taken together, seem to us to include whatever is properly referable to the trade, and distinguishable from the increased value which that trade gives to the land. We do not now speak of the amounts allowed under each item, and we decline to give any opinion on this point, which is properly for the sessions; but, if these are the proper heads of deduction, then the residue must represent the value of the occupation; and, if so, this alone is brought into the rate, and the profits of trade are excluded. Accordingly the sessions have found, as an inference from the facts, that the residue is the sum which a tenant from year to year might reasonably be expected to give for the railway and corporeal hereditaments now occupied by the company in connection with the railway, exclusive of the stations and other buildings rated separately; such tenant being assumed to have the same, and no other power of using the railway, the same and no other advantages and privileges, as the company now possess. If the deductions exhaust that portion of receipts referable to trade, the inference of the sessions is fair; if the advantages and privileges which the company possess are attributable to their occupation, and would pass with it, their assumption is well founded. We agree with them in both.

The appellants, however, contend that, even if the principle of the rate be fair, some reasonable deductions are omitted. We have used the sufficiency of the deductions made as a mode of trying the principle; but the objection of the appellants now to be considered is one of detail. The only instance which they specify and rely on is, that an allowance ought to be and is not made for goodwill. We presume by this is meant that a person bargaining with the company to become their yearly tenant of the railway

in the expectation of succeeding to their trade as a probable consequence of succeeding to occupation, would properly be called on to pay them something for the goodwill of that trade; and that this would be in the nature of an out-going, a deduction from profits. This objection appears capable of two answers; the first, and a decisive one, is that the purchase of goodwill implies that a trade is sold; that the company are to be bound to surrender their trade to the lessee, and no longer to be carriers on the line; but the calculation of the sessions proceeds on no such supposition; all those special advantages indeed for carrying it on, which the occupation gives them, whatever they may be, they must necessarily surrender; but, the moment they had leased the railway, they would become a part of the public, and have the right to carry on their trade, retaining all the goodwill, with all those advantages which the statutes have carefully reserved for the public. Secondly, though the supposition of a tenancy is to be made, yet what the incidents of the tenancy must be as to actual terms and allowances must be determined for the purpose of fixing the amount of the rate by the actual state of things; for this supposition of a tenancy is only a mode of ascertaining the existing value of the occupation to the existing occupier: now here there is no tenancy in fact, no goodwill is in fact paid for, and therefore no deduction ought in fact to be made on account of its price.

Again, it is contended that the existing facts of this case shew the unreasonableness of the rate; the carrying trade of the company goes beyond their one line, upon the railways of other sets of proprietors, but the receipts arising from this have been excluded from the rate. This, it is said, is inconsistent; how can the profits which the same engine earns by drawing goods over one mile, be of a different character from those which it earns in the same employ over the next mile? So far from there being any inconsistency in this, it is certainly involved in the principle on which the rate rests; that the distinction can be made, and has been made, is no slight proof of the soundness of

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that principle; the moment that the engine leaves the railway of the company, what it earns ceases to have any connection with their occupation of the railway; it may, and of course does, increase the value of the occupation of that other line on which it then works, and will of course, in the shape of toll, proportionably increase the rate which the occupier will pay; but, if it were allowed to swell the charge of the company, it could only do so in respect of the profits of trade; and these our principle excludes.

But it is said, lastly, that this principle works injustice between the company and those other corporations, or individuals, who carry on their line. Their engines, and their trade, it is said, pay nothing to the poor rate directly, and indirectly only in respect of their toll; which may be supposed to be calculated so as to bear its own rate; whereas the company pay both on their tolls and their fares. Colour is given to this objection from the facts, which might seem to explain it, that the company fill two characters, the other parties one only. But the proper answer is a denial of the fact; the company do not pay directly or indirectly on their fares; they pay only on the increased value of their occupation of land, occasioned by whatever circumstances. If a trader should underlet to a lodger a room in his house, in which he drove the most profitable trade imaginable, such lodger would pay no poor rate at all; but, as the trader would proportion the rate at which he let the lodgings, to the advantage which such lodger derived from them, the total rent which the trader would pay, and the rate which would be imposed on him, would be proportionably increased; but could he complain of any injustice, or say that he carried on his own trade in the residue of the house to a disadvantage, because in his rate the value, which his trade so carried on in the residue gave to his occupation, was also taken into account in fixing the quantum of the rate? Yet those parties, who carry on a trade upon the company's line, are in effect but in the nature of lodgers, or parties enjoying a

profitable easement on the line, and, by the consideration they pay, increasing its general value.

In the examination, which this case has compelled us to make, we have necessarily been led into a reconsideration of the principles on which the decision in the case of the South Western Railway proceeded. That decision was not directly impugned in the argument; but the distinction of fact relied on has appeared to us on examination so unsubstantial, that it was necessary, in order to a decision against this rate, to examine the principle on which that was upheld; and in a matter of such real importance, and such apparent novelty, where, too, the decision of this Court cannot be reviewed in a court of error, we were not unwilling again to examine the question.

Upon the whole we are satisfied with the decision of the sessions; it appears to us founded on a just appreciation of established principles, in accordance with several decided cases, and conflicting with none. Our judgment, therefore, will be for the respondents.

Order of sessions confirmed.

The QUEEN v. CHARLES A. H. H. ELLIS, Clerk of the Peace for the County of Middlesex.

ON an appeal against an order, bearing date the 12th December, 1843, under the hands and seals of *John Tidd Pratt*, Esq. and *John Johnson*, Esq., two of her Majesty's justices of the peace in and for the county of Middlesex, whereby the overseers of the poor of the parish of St. Margaret, Westminster, in the county aforesaid, were ordered to cause *Harriet Ellis*, an insane person, to be conveyed to a house duly licensed for the reception of insane persons in the county of Surrey; it appearing to the said justices, private asylum, when the county asylum happens to have no room for the reception of the party.

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Under 9 Geo. 4, c. 40, ss. 38, 41, where a county lunatic asylum has been established for any county or district, justices acting for that county or district cannot remove a pauper lunatic to a hospital or

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J. T. Pratt and *J. Johnson*, that there was not room or accommodation for the said *H. Ellis* in the county lunatic asylum, established at Hanwell, in the county of Middlesex; and against a certain other order, bearing date the said 12th of December, 1843, under the hands and seals of the said *J. T. Pratt* and *J. Johnson*, justices as aforesaid, in and for the said county, whereby the said justices did adjudge the settlement of the said *H. Ellis* to be in the parish of St. Luke, in the county of Middlesex, and did order the overseers of the poor of the said parish of St. Luke to pay the sum of 6s. 6d., being the amount of the reasonable charges of conveying the said *H. Ellis* to the licensed house, and also to pay to *Peter Armstrong*, the keeper of the said licensed house, the sum of 10s. per week, which payment the said *Peter Armstrong* was willing to accept, and the same appeared to the said justices, *J. T. Pratt* and *J. Johnson*, to be a reasonable charge for the maintenance, medicine, clothing and care of the said *H. Ellis* whilst confined therein; the sessions quashed both the orders, subject to the opinion of this Court upon the following case :

At the time when the orders in question were applied for and made, there was a county lunatic asylum at Hanwell, in and for the county of Middlesex, which asylum then contained upwards of 900 patients, and was then quite full. When that asylum was first completed, under the provisions of the statute 9 *Geo. 4*, c. 40, it was capable of containing 300 patients only. It was afterwards enlarged and altered from time to time, until it became capable of containing 900 patients; but it was proved before the justices, who made the orders appealed against, that there was no room or accommodation for the said *H. Ellis* in the said county lunatic asylum, when the said orders were made. The above facts were admitted on both sides, when the appeal came on to be heard. The appellants insisted that since in fact there was a county lunatic asylum in Middlesex, the justices had no jurisdiction under 9 *Geo. 4*, c. 40,

s. 38, to direct such insane pauper's removal to a house duly licensed for the reception of insane persons; and that, at any rate, the justices had no jurisdiction to remove the pauper to a house out of the county of Middlesex, within which county there were many houses duly licensed for the reception of insane persons, and to which the pauper might have been sent.

The Court of Quarter Sessions, on the objections so taken, quashed the orders, subject to the opinion of the Court of Queen's Bench.

If the Court of Queen's Bench should be of opinion that the said orders were under these circumstances legally made, then the said orders of justices to stand affirmed, and the order of sessions to be quashed; otherwise, the said orders of justices to be quashed, and the order of sessions affirmed.

Prendergast in support of the order of sessions. The powers given to justices by 9 *Geo.* 4, c. 40, s. 38, are, on proof of the insanity of a poor person, chargeable to any parish, and on inquiry into the settlement, to cause him "to be conveyed to and placed in the county lunatic asylum, established under the directions of this or any former act for the county or district of united counties for which or any of which they shall act; and, if no such county lunatic asylum shall have been established, then to some public hospital, or some house duly licensed for the reception of insane persons." And the same words are repeated in sect. 41, which provides for the removal of pauper lunatics whose settlement has not been ascertained, being the order under which the first removal was made in the present instance. The Court cannot extend the limited powers here given to the justices, so as to make them comprise a case not contemplated by the act; viz. where there is a county lunatic asylum established, but no room in it, to authorise them to remove to a private asylum. In *Rex v. Chagford* (a) it was held, that the power given to magistrates by 55 *Geo.* 3,

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(a) 4 B. & Ald. 335.

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c. 101, of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined, by the express words of the statute, to two cases only, viz. the death or removal of the pauper; and that the equity of the statute could not be relied on to make it comprehend a third case, not mentioned in it, although equally reasonable, viz. where the pauper during such suspension became irremovable in consequence of an estate descending to him. And at all events, the justices had no right to order the removal to a licensed house out of the county for which they act.

Bodkin and Pashley contra. As to the last point, there is nothing whatever in the act to confine the justices to select a licensed asylum within their own county. As to the first, this is a case in which it becomes absolutely necessary to recur to the equity of the statute, in order to meet an omission from which otherwise great evils might arise. By sect. 44, where a person is found wandering about "so far disordered in his senses that it is dangerous for such person to be abroad," the justices are directed to remove him, "in the same manner as has been hereinbefore directed in the case of a person chargeable to any parish." That is, in the manner provided by sect. 38; if, therefore, the strict construction contended for on the other side is to prevail, dangerous lunatics must be left to wander abroad whenever it happens that there is a county asylum, but no room in it for their reception. The same strictness would lead to other difficulties. The direction to remove to a private asylum is only in case "no such county lunatic asylum shall have been established." Suppose a county lunatic asylum to have been established, but burnt down, or rendered accidentally unfit for the reception of patients, in such case, if the letter of the statute is to be followed, no removal could take place. The only latitude of construction, contended for here, is to give to the word "established" the liberal meaning, "so as to be fit for the reception of the

pauper." And this distinguishes the case from *Rex v. The Inhabitants of Chagford* (a), where *Holroyd J.* expressly says, "The statute cannot, I think, be construed so as to apply to this case," and brings it within the rules of liberal construction adopted in other instances: *Edmunds v. Lawley* (b), *Doe d. Richardson v. Thomas* (c), *Rex v. Hall* (d).

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LORD DENMAN C. J.—The sessions were right in quashing the order for the removal of the pauper to the private asylum; for it was an order which the legislature has not given the justices power to make. To hold otherwise would not be to construe the act, but to make a new enactment. Here we have affirmative words, the meaning of which is free from all difficulty. A county lunatic asylum has been "established." The justices could not remove the pauper elsewhere. And the only consequence of this decision will be, that the pauper will have to be maintained by his parish, as he would have been before the act.

WILLIAMS J. concurred.

COLERIDGE J.—The legislature probably assumed that, if a county lunatic asylum has been established, it will be sufficient for pauper lunatics. On this assumption the enactment proceeds. The case therefore falls within the general and inflexible rule, that officers acting under a special power given by statute can only justify themselves by shewing that they have acted within that power.

WIGHTMAN J. concurred.

Order of Sessions confirmed.

(a) 4 B. & Ald. 235.

(b) 6 M. & W. 285.

(c) 9 A. & E. 556; S. C. 1 P. & D. 578.

(d) 1 B. & C. 136; S. C. 2 D. & R. 341.

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The QUEEN v. The Inhabitants of CASTERTON (a).

1. An order of sessions recited an order of removal appealed against, in which the words "Westmoreland, to wit," were in the margin, and which recited a complaint, "unto us whose names are hereunto set and seals affixed, being two of her majesty's justices, &c. for the said county."

Held, that the order of sessions shewed sufficiently that the justices who made the order appealed against were justices of the county.

2. The same order of removal purported to be directed "to the overseers of the poor of the township of Kirkby Lonsdale and to the overseers of the poor of the township of Casterton in the said county."

Held, that it sufficiently appeared that Kirkby Lonsdale (the respondent parish) was in the county of Westmoreland.

3. The order of sessions concluded:—"And whereas the overseers of the poor of Casterton did prosecute and carry on the said appeal to trial against the said order to the present general quarter sessions of the peace, wherein this court, upon hearing of counsel on both sides, ordered that the said order be confirmed."

Held, a sufficient adjudication of confirmation of the order.

THE following order of session had been brought up by certiorari.

Westmoreland, to wit. Be it remembered, that at the General Quarter Sessions of the peace of our lady the queen, holden at Appleby, in and for the county of Westmoreland, on Monday, the first day of January, in the seventh year of the reign of our sovereign lady *Victoria*, &c., before *W. Crackenthorpe*, *W. Slopes*, *W. Wilkinson*, Esqrs. and others their associates, justices of our lady the queen, assigned to keep the peace of our said lady the queen in and for the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the county aforesaid committed, that same sessions of the peace is adjourned by the justices aforesaid until Friday the 5th of January aforesaid, in the year aforesaid, at eleven o'clock in the forenoon of the same day, to be holden at Kendal in and for the county aforesaid, to do further as the Court shall then consider, &c. And on the said Friday the 5th of January aforesaid, the same general quarter sessions of the peace is holden by the adjournment aforesaid at Kendal aforesaid, in and for the said county, before *E. W. Hasell* and *G. Watson*, Esqrs. and others their associates, justices of our said lady the queen, assigned to keep the peace of our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the county aforesaid committed; at which said general quarter sessions of the peace continued and

(a) Decided Mich. Term, 1844, (Nov. 25).

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holden by the adjournment aforesaid, on the said Friday the 5th of January aforesaid, in the year aforesaid, before the said justices last named, an appeal against a certain order bearing date the 28th of October, 1843, under the hands and seals of *J. Wakefield* and *R. Fothergill*, Esqrs. is then and there depending for trial; which said order is annexed to this schedule, and is in manner and form as follows:—"Westmoreland, to wit: To the overseers of the poor of the township of Kirkby Lonsdale and to the overseers of the poor of the township of Casterton in the said county; whereas you the overseers of the poor of the township of Kirkby Lonsdale have made complaint unto us whose names are hereunto set and seals affixed, being two of her majesty's justices of the peace and quorum in and for the said county, that *James Dixon* has come to inhabit in your said township, not having gained a legal settlement there, nor having produced a certificate owning him to be settled elsewhere, and that the said *James Dixon* has become actually chargeable to your said township: we the said justices, upon due proof made thereof upon oath, and likewise upon due consideration had of the premises, do adjudge the same to be true, and we do likewise adjudge that the lawful settlement of the said *J. Dixon* is in the parish, township, or place of Casterton, in the county of Westmoreland. We do therefore require you, the said overseers of the poor of the said township of Kirkby Lonsdale, or some or one of you, to convey the said *J. Dixon* from and out of your said township of Kirkby Lonsdale to the said parish, township, or place of Casterton, and him, together with this our order or a true copy thereof, to deliver to the overseers of the poor there, or some or one of them, who are also hereby required to receive and provide for him according to law. Given under our hands and seals the 28th of October, 1843; *John Wakefield, Richard Fothergill*." And whereas the overseers of the poor of the township of Casterton did prosecute and carry on the said appeal to trial against the said order to the present general

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quarter sessions of the peace, and wherein this court upon hearing of counsel on both sides ordered that the said order be confirmed by this court. By the Court, &c."

The principal objections on which the rule for bringing up the order was obtained, were, 1, that it fails to shew on the face that the original order was made by justices for the county of Westmoreland: 2, that the original order recited in it does not shew that the respondent township of Kirkby Lonsdale is in the county of Westmoreland: 3, that the order of sessions does not confirm the original order in express terms, but only indirectly and by way of recital.

Baines and Ramshay shewed cause (a) against quashing the order. As to the first objection, the order of sessions, undoubtedly, does not state that the two justices who made the order of removal, Mr. Wakefield and Mr. Fothergill, were justices for the county of Westmoreland, or justices at all; but the defect is supplied by the original order itself, which is recited and thereby made part of the order of sessions. In that order the county "Westmoreland" appears in the venue; and the justices describe themselves as "for the said county." That words of reference may connect the order with the county named in the margin is undeniable: *Rex v. Holbeck, in Leeds* (b). The cases of *Rex v. Chilverscoton* (c), *Rex v. Moore Critchell* (d) are overruled by *Rex v. St. Mary's Leicester* (e). *Rex v. Bourn* (f) shews that the reference is sufficient. 2. The recited order is addressed "to the overseers of the poor of the township of Kirkby Lonsdale and to the overseers of the poor of the township of Casterton in the said county;" and the only question is, whether the last words may refer to both the townships named, or must be confined to the

(a) In Mich. Term, 1844, (Nov. 9) before Lord Denman C. J., Williams, Coleridge and Wightman Js.	864.
(b) Burr. S. C. 198; 2 Bott,	(c) 8 T. R. 178.
	(d) 2 East, 66.
	(e) 1 B. & A. 327.
	(f) Burr. S. C. 39.

last only. If by grammatical construction they can refer to both, they will be held to do so to support the order. In *Magna Charta*, cap. 29, on the words “nullus liber homo capiatur vel imprisonetur,” and “neque suprà eum ibimus, nisi per legem terræ,” &c. the words “nisi per legem terræ,” are held to cover all the members of the preceding sentence, and not to be confined to the immediately preceding words only: 2 *Dwarris* on Statutes, 808, (on this point they were stopped by the Court.) As to the 3d objection, an adjudication in the words “having adjudged,” was held sufficient in *Rex v. Maulden* (a).

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Pashley contrà. *Rex v. Moor Critchell* (b) is in part overruled by *Rex v. St. Mary's Leicester* (c); but *Rex v. Chilverscoton* (d) is not touched by it. And, even if the jurisdiction appears in the recited order, it ought also to appear, substantially, in the order of sessions itself: *In re Clarke* (e). As to the second point, it is a general maxim, that words of reference relate to the proximate antecedent: *Baker v. Bacon* (f). In *Rex v. Kenworthy* (g) the words “it is ordered,” in an entry on the record of a conviction of perjury, were held not to amount to a judgment.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—The principal question in this case is, whether the justices, making the original order of removal, appear upon the face of it to have jurisdiction; or, in other words, whether they are stated with sufficient certainty to be justices of and for the county in which the removing township is situate. The order, so far as this point is con-

(a) 8 B. & C. 78; S. C. 2 M. & R. 146.

(b) 2 East, 66.

(c) 1 B. & A. 327.

(d) 8 T. R. 178.

(e) 2 Q. B. 619; S. C. as *Ex parte Clarke*, 2 G. & D. 780.

(f) Sir F. Moore, 754.

(g) 1 B. & C. 711; 3 D. & R. 173.

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cerned, is in the following form:—"Westmoreland, to wit. To the overseers of the poor of the township of Kirkby Lonsdale, and to the overseers of the poor of the township of Casterton *in the said county*." It then proceeds to state the complaint of the overseers of Kirkby Lonsdale thus:—"unto us whose names are hereunto set and seals affixed, being two of her majesty's justices of the peace and quorum in and for *the said county*." The rest of the order being in the usual form, and not objected to, it is not material to set out.

It was contended, in argument, that, inasmuch as the justices have failed to describe themselves, in terms, as being justices of and for the county of Westmoreland, their jurisdiction to make the order is not shewn, and that, therefore, it cannot be supported. The cases cited were *Rex v. Chilverscoton* (a), and *Rex v. Moor Critchell* (b). It was admitted, however, by the learned counsel, who argued against the validity of the order, that the latter case can no longer be considered as law. But, be this as it may, we are of opinion that neither of the cases cited is applicable to the present.

In the case of *Chilverscoton*, there was no county in the margin of the order, and in the body of it one parish was described as being in one county, and the other in another; and it was upon this circumstance, (the mention of *two* counties,) that the want of jurisdiction of the removing justices was made to depend. The Court considered that it was left uncertain of *which* county they were justices. In the case of *Moor Critchell*, the county of Wilts was in the margin of the order; but, in the body of it, the county of Dorset was mentioned also, and the justices described themselves as "justices in and for *the said county*." And upon this the Court held that it ought expressly to appear that the justices had jurisdiction to make the order, and that, *two* counties having been mentioned

(a) 8 T. R. 178.

(b) 2 East, 66.

before they ought to have stated of which county they were justices.

It is obvious, therefore, that the order, in the present case, is free from that uncertainty which, in both the instances referred to, the Court considered to be fatal. And the question seems to resolve itself into this,—whether the margin is to be considered part of the order or not: because, if it be, the two contending townships are described as being in the county of Westmoreland, (none other being named) and the removing justices as being justices of that county, by words of direct reference. Now this point seems to have been long settled. The case of *Rex v. Holbeck, Leeds(a)*, is thus reported:—"It was objected in this case, to the order of removal, that the borough of Leeds is not mentioned in the body of the order, but only in the margin, and therefore it does not appear that the two justices had jurisdiction to make it; Lee, Ch. J. I take it to be settled that, in orders, the margin is to be considered part of the order, and therefore a plain reference to it is sufficient." And the Court decided accordingly. We are of opinion that, so construing the present order, it may be sustained, and that the jurisdiction of the justices making the order sufficiently appears.

It was also objected (though to this, we believe, an answer was given at the time) that the order of sessions is defective, inasmuch as it purports to be in the shape of recital only, and not of direct allegation; we think, however, that the order does *adjudicate*, and that, therefore, this objection also fails.

Upon the whole therefore we are of opinion that the rule must be discharged.

Rule discharged.

(a) Burr. S. C. 198; S. C. 2 Bott, 652.

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In the examinations on which an order of removal was made, a witness stated, "On the 22d July, 1839, I let a house, situate, &c., to the pauper, at the rent of 10*l.* per annum. The pauper occupied the house until the 22d July, 1841, and paid me the whole rent during that time."

Held (Cole-ridge J. dissentiente), that it did not sufficiently appear that the occupation was under the yearly renting.

ON appeal to the Northamptonshire Quarter Sessions against an order for the removal of *Ann Adams*, &c. from the parish of Farthingstone, in the said county, to the parish of St. Sepulchre, in the town of Northampton, the sessions confirmed the order, subject to the opinion of the Court of Queen's Bench upon the following case :

The order of removal was grounded on certain examinations ; the material portions of those on which any question arose are the following :—*Jacob Putley* stated as follows, "On the 23d of July, 1839, I let a house, situate at No. 10, Leicester Street, in the parish of St. Sepulchre, in the town of Northampton, to *Thomas Adams*, the husband of the pauper, *Ann Adams*, at the rent of 10*l.* per year, exclusive of the parochial rates ; the said *Thomas Adams* occupied the house until the 22d of July, 1841, and paid me the whole of the rent during that time."

Ann Adams (the pauper) stated as follows—"In the month of August, 1832, I was married to *Thomas Adams*, &c. In the month of July, 1839, my said husband and I went to a house, No. 10, Leicester Street, in the parish of St. Sepulchre, in the town of Northampton, belonging to Mr. *Putley*. We resided in that house until March, 1842, when my husband died," &c.

Amongst other grounds of appeal were the following : That the examinations are defective and insufficient, as it is not therein stated, nor does it appear therefrom, that the said *Thomas Adams* rented or occupied the house No. 10, Leicester Street, in the parish St. Sepulchre, in the said examinations mentioned, or any other house or tenement in the said parish under a yearly hiring. That it is not stated in the said examinations, nor does it appear therefrom, that the said *Thomas Adams* ever bonâ fide rented a

tenement in the said parish of St. Sepulchre, at the sum of 10*l.* a year at the least for the term of one whole year, or that he occupied any such tenement under such yearly hiring, and actually paid the rent for the same, to the amount of 10*l.* at least for the term of one whole year. That it is not stated in the said examinations, nor does it appear, that the said *Thomas Adams* resided for forty days or upwards in the said parish of St. Sepulchre, whilst renting and occupying a tenement therein at a yearly rent of 10*l.* or upwards.

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At the trial of the said appeal it was objected, on behalf of the appellants, that the examinations were defective for the causes set forth in the foregoing grounds of appeal.

The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the above objections.

If the Court should be of opinion that the Court of Quarter Sessions ought to have given effect to the above objection, or either of them, the order of sessions to be quashed, otherwise the order of sessions to be confirmed.

K. Macaulay and *Mills* in support of the order of sessions. One objection to the examinations is, that the residence of the pauper does not sufficiently appear. But the pauper herself states distinctly that she and her husband went to the house in the appellant parish in July, 1839, and resided there till March, 1842.

The more important question will probably be, whether the examinations shew that the pauper rented the house for a year, and occupied it under such yearly hiring. The objection appears to be founded on *Reg. v. Recorder of Pontefract (a)*. There the examination stated that the pauper occupied two distinct sets of premises at yearly rents, and occupied them for three years, and paid the several rents as they became due; and it was held that it did not appear that there was a renting for a year, and an

(a) 2 Q. B. 548; S. C. 2 G. & D. 700.

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occupation under it. But in that case nothing more was stated than the fact that the pauper *occupied* at a yearly rent, and that such rent was paid; it was not stated that the yearly rent was contracted for. Here it is stated that the house was "let at the rent of 10*l.* per annum." A mere general occupation and acceptance of rent, even without more, will constitute a tenancy from year to year: *Doe d. Martin v. Watts* (a). And it was observed by *Bayley J.* in delivering the judgment of this Court in *Rex v. Herstonceaux* (b), that "there is nothing in the preamble of the 6 *Geo.* 4, c. 57, or of the 59 *Geo.* 3, c. 50, which shews that it was in the contemplation of the legislature to require more than what would constitute in ordinary cases a tenancy for a year." The examinations supply abundant evidence to establish a tenancy from year to year. A jury would properly be directed upon such evidence to find in favour of a tenancy from year to year, and, if that is so, the magistrates had sufficient evidence to found their order upon. It is erroneous to apply to examinations the rules of special pleading, and to say that such and such "averments" must appear on the face of examinations. Examinations can be nothing more than the *evidence* on which magistrates are called upon to act. This point is dealt with by Lord *Denman C. J.*, in delivering the judgment of the Court in *Reg. v. Pilkington* (c), "In the course of the argument," his Lordship observes, "there was a minute criticism entered into of some of the expressions in the examination; but we think there is no valid objection to that examination. It may be very true that when the settlement depends upon a simple fact known to the pauper, such as that he resided in a particular parish, or was unmarried and without child or children, it is reasonable to expect his examination should contain a specific statement of that very fact. But it is a very different question, whether his examination should state the legal consequence of particular

(a) 7 T. R. 83.

(c) 3 G. & D. 319.

(b) 7 B. & C. 551; S. C. 1 M. & R. 426.

facts. Whether a pauper has been duly hired, so as to gain a settlement, is often a very difficult question of law. The removing justices may possibly have asked the pauper whether he was hired or not; the answer may have been, "I don't know what you call '*hired*,' but I will tell you what took place on the occasion." And then he may possibly have stated facts as on the present occasion; and if the facts so stated amount to a hiring for a year, then the justices may properly adjudicate that the settlement was gained, and remove the party upon it, and they must form their opinion upon the effect of such statement. The facts stated in this examination certainly amount to evidence of a proper hiring, and the examination therefore is sufficient." Can it be said that the facts stated in the examinations now before the Court do not amount to evidence of a renting for a year and of occupation under such renting? If any examination is to be defeated by its possible consistency with some other state of facts than that which will support the settlement, no case can ever be supported, even in part, by circumstantial evidence. *Rex v. Banbury (a)* does not affect this case, for there it was stated that there had been two distinct hirings, and that the occupation had been under them successively; here it appears that there has been only one hiring, and the occupation must of course have been under it.

Miller and Barlow contra. This examination cannot be held good without overruling *Reg. v. Recorder of Pontefract (b)*, for in that case also there was evidence on which the removing magistrates were justified in finding that there had been a renting for a year. The question however is not on the evidence, but, as it were upon the record, whether the examinations present such a case as that the respondents can be allowed to go into evidence to support it. It has been held repeatedly that all the essentials of a set-

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(a) 1 A. & E. 136.

(b) 2 Q. B. 548; S. C. 2 G. & D. 700.

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tlement must be stated, and here, at the utmost, only one essential, the renting at 10*l.* a year, is stated. But, even as to the renting, it is not stated from what date the tenancy was to commence. The letting was agreed upon on the 22d July, 1839, but it does not appear for what period the house was let.

The main objection however is, that the occupation does not appear to have been under the yearly hiring, which is necessary, according to *Rex v. Banbury* (a). *Reg. v. Stoneleigh* (b), *Reg. v. Flockton* (c) and *Reg. v. Leeds* (d), shew that the essentials of the settlement must be stated, and not left to inference, and these examinations leave it as a mere matter of inference, whether the occupation was or was not under the hiring.

Even as to the residence, there is no averment in the examination of the pauper that she resided from July, 1839, thenceforth until March, 1842, and if the fact were otherwise she could not be indicted for perjury, as having sworn to such continuous residence.

LORD DENMAN C. J.—I adhere to former cases, which govern this. The effect of them will, I trust, be to produce greater care and precision in the preparation of cases of removal. We cannot accept inference instead of statement. The order of sessions must be quashed.

WILLIAMS J.—I am of the same opinion. It has repeatedly been laid down that nothing which can be stated is to be left to inference. We are not startled at our doctrine, nor do we wish to retire from it. I abide by *Reg. v. Recorder of Pontefract* (e).

COLERIDGE J.—I am as desirous as the rest of the Court

(a) 1 A. & E. 136.

(d) *Ante*, 119.

(b) 2 Q. B. 530; S. C. 2 G. & D. 535.

(e) 2 Q. B. 548; S. C. 2 G. & D. 700.

(c) 2 Q. B. 535; S. C. 2 G. & D. 664.

to hold strictly to the rule we have laid down with respect to examinations and grounds of appeal. But I am not satisfied in this case that our rule has not been complied with. I think this examination is sufficient, and, if *Reg. v. Recorder of Pontefract* (a) had not been decided, my opinion would be the stronger. As it is, I do not wish to recede from that decision. But, although I agree with that case, I think that this examination, which states that on a given day in July, 1839, the landlord let a house at 10*l.* a year to the pauper, and that the pauper went to the house on that day and occupied it until the same day in July in 1841, and paid the whole rent, which means the rent spoken of before, does shew a sufficient occupation under the yearly renting.

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WIGHTMAN J.—I agree that it does not appear that the statute has been complied with. It has been decided in a great many cases, that nothing can be left to intendment, unless it be a necessary intendment. It will not be enough, therefore, that the examination be consistent with either a conformity or a nonconformity to the statute applicable to the particular settlement. My difficulty is not as to the renting for a year, but as to the latter requisite, that it does not appear that the occupation was under the yearly renting; the examination is so worded that the occupation may, consistently with the examination, have been under some other renting.

Order of Sessions quashed.

(a) 2 Q. B. 548; S. C. 2 G. & D. 700.



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1. On an application to the justices at petty sessions for a bastardy order under stat. 2 & 3 Vict. c. 85, the party charged attended with his attorney, and after some witnesses had been examined in support of the application, and cross-examined by his attorney, requested that the charge should be determined at the quarter sessions, under sect. 3.

Held, that, as the case had been entered upon, the justices properly refused to let it go to the quarter sessions.

2. A bastardy order, dated the 2d Feb. 1844, after reciting the birth of the child "on

the 27th February now last past," and other necessary matters, ordered that the father should pay a sum of money to meet "the actual expense incurred in the maintenance of the child from the time of its birth as aforesaid to the time of making this order," and also a further sum weekly for future maintenance."

Held, that so much of the order as related to past maintenance was bad, as including more than six months' past maintenance, contrary to stat. 4 & 5 Will. 4, c. 76, s. 73, but that the order was good for the residue.

3. The order directed the payments to be made to the *churchwardens* and *overseers* of a township, the township having no churchwardens.

Held (dubitante Lerd *Denman* C. J.) that the order was sufficient notwithstanding.

The QUEEN v. OXLEY and another, Justices of Ripon (a).

MARTIN had obtained a rule for a certiorari to remove an order in bastardy made by the above named defendants as justices of the peace acting in and for the liberty of Ripon, in the county of York, under statute 2 & 3 Vict. c. 85.

The order bore date the 2d of Feb. 1844, and after reciting that upon hearing the application of *the churchwardens and overseers of the poor of the township of Ripon*, in the said liberty, it appeared to the undersigned justices, assembled at petty sessions, that a male bastard child was lately, that is to say, *on the 27th of February then last past*, born in the township of Markington-with-Wallerthwaite in the said liberty, of the body of *Mary Denison*, single woman, and that the said child was, by reason of the inability of the mother to provide for its maintenance, become chargeable to the township of Ripon in the said liberty, and that *John Brown*, of Hill House, in the said township of Markinton-with-Wallerthwaite, labourer, was really and in truth the father of the said bastard child. The adjudication proceeded as follows:—"It is therefore adjudged by the said justices that the said *John Brown* is the father of the said bastard child, and we do hereby order that the said *John Brown* shall forthwith pay, or cause to be paid, *to the said churchwardens and overseers of the said township of Ripon*, the sum of nine shillings and four pence to reimburse the said township the actual expense

(a) Decided in Trinity Term, 1844, (June 11).

incurred in the maintenance and support of the said bastard child *from the time of its birth aforesaid until the time of making this order*; and shall also weekly and every week from the date of this order, and so long as the said bastard child shall be chargeable to the said township of Ripon, and until the said bastard child shall attain the age of seven years (if the said child shall so long live), pay or cause to be paid unto the *churchwardens and overseers* of the poor of the said township of Ripon the sum of one shilling and sixpence, to reimburse the said township of Ripon the actual expense to be incurred in the maintenance and support of the said bastard child."

It appeared from the affidavit that at the petty sessions *Mary Denison*, the mother of the child, was examined before the justices, together with a witness in corroboration of her evidence in support of the charge, and that the said *John Brown* appeared by his attorney, who cross-examined both the above witnesses on his behalf. The justices having however expressed themselves satisfied with the corroborative evidence, the attorney then stated, before entering upon the defence further than the cross-examination of the witnesses, that *Brown* was desirous that the charge should be heard and determined at the quarter sessions under the third section of the statute, and applied to the justices to take the necessary recognisances, which *Brown* was then ready to enter into. The justices however thought the application too late, after the case had been part heard, and the witnesses in support of the charge cross-examined on behalf of the defendant, and refused to take the recognisances, whereupon the defendant declined calling witnesses or proceeding with his defence.

The affidavit also stated that there are no churchwardens for the township of Ripon, but that it forms part of the parish of Ripon, and that there are churchwardens for the parish.

Baines and *Pickering* now shewed cause. The first

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objection taken to this order is, that the justices in petty sessions were bound to stay their hand at any time upon the defendant declaring that he was desirous that the charge should be heard and determined by the quarter sessions, and offering to enter into the recognisances required by the 2d section of statute 2 & 3 *Vict.* c. 85. But such was clearly not the intention of the statute, nor is such a construction warranted by the words. The 1st section authorises the justices in petty sessions, upon the application of the overseers, to make an order upon the person charged with being the putative father of a bastard child, to reimburse the parish for its support, and for that purpose provides that they shall have "all the powers and duties in regard thereunto which are given to the court of general quarter sessions by virtue of stat. 4 & 5 *Will.* 4, c. 76, s. 72." They are therefore constituted an independent tribunal, with power to entertain and finally adjudicate upon the charge. But then the 3d section provides, "that if the party charged shall declare to the justices that he is desirous that the charge shall be heard and determined at the quarter sessions of the peace, and shall then enter into the recognisances there required, the justices shall not proceed *further* to hear the charge." This merely gives the defendant the option of the two tribunals, but it does not allow him to take the chance of both, and he must make his election, either to defend the case then, or to enter into recognisances to try at the sessions. The word "*further*" can not bear the meaning which is contended for, but must mean that upon the declaration of the defendant that he prefers having the case heard at quarter sessions the justices in petty sessions shall not proceed to entertain it at all. The same word occurs in a lower part of the same clause in the same sense. "In such case," (that is, upon the defendant's entering into the recognisances,) "*all further* proceedings in the matter of the charge shall be had before the court of quarter sessions." But this can not mean that the proceedings which had been commenced

before the petty sessions shall be continued before the quarter sessions, in the sense that they are to take up the matter where the petty sessions left off, but that in the event there contemplated, the quarter sessions shall entertain the case, and not the petty sessions. The jurisdiction of the Court of Quarter Sessions is not in the nature of a court of appeal from the petty sessions, for this cannot be implied, but must be created by express words, but is a concurrent jurisdiction; and to permit the defendant to take the chance of the one, and finding that adverse to resort to the other, would be to allow him to adopt two remedies at the same time. This it is submitted he is not entitled to do; *Rex v. Justices of Suffolk (a)*.

The next objection is, that it appears on the face of the order that the child was born more than six months previous to the application being heard, and that it is bad for commanding the defendant to reimburse the township the actual expense incurred from the time of the birth to the time of making the order. It must be admitted that where the birth of the child has taken place more than six calendar months previously to the application being heard, the costs of maintenance under stat. 4 & 5 Will. 4, c. 76, s. 73, are to be calculated from the day of the commencement of the six calendar months previous to the hearing of such application, and confined within that period. But then to render the order defective on this ground, it must be certain that the costs have been calculated from a longer time. Here the date of the birth of the child is laid under a videlicet, and it is submitted that it need not have been inserted at all; it is therefore the same as if it had been wholly omitted. But in that case the Court would so construe the order that it might be supported, and would not assume that the child had been born more than six calendar months previous to the hearing of the application, and that the order was made to reimburse expences incurred during the whole of that time: *Rex v.*

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(a) 6 Ad. & Ell. 109; S.C. 1 N. & P 306.

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Gill (a), *Rex v. Picton* (b), *Rex v. Stockton* (c). Assuming the child to have been born more than six months before the hearing of the application, no costs may have been incurred by the parish till within the last six months. But this objection can only prevail as far as regards the nine and fourpence, and the order will be good for the rest. It contains two distinct adjudications, and is clearly divisible.

The third objection is, that the application is made by the *churchwardens* and overseers of the township of Ripon, and the money is directed to be paid to them, whereas Ripon is a township, and has no churchwardens, but only overseers. But this is immaterial, for the overseers are the proper parties to make the application under the statute; they do make it, and the application cannot be rendered of none effect by other parties joining therein who have no authority, it is therefore mere surplusage; *Reg. v. Goodall* (d).

Martin contra. The justices were bound to send this case to the Court of Quarter Sessions. Upon the expression of the defendant's intention to remove it, and his offering to enter in the recognisances required by the act, their jurisdiction was ousted, and after that they could not proceed. The defendant had a perfect right to say at any time before judgment pronounced, "I am not satisfied with this tribunal, I wish to go to the higher tribunal." This is clear from the words of the act. Application is to be made to the justices in petty sessions, and a notice to be given to the party charged to appear before them under the 1st section. Then, if on appearance he shall declare that he is desirous that the charge shall be heard and determined at the quarter sessions, and shall enter into the recognisances required by the statute, the justices shall not proceed *further* to hear the charge. The words import that they

(a) R. & R. 431.

(b) 2 East, 195.

(c) 5 B. & Ad. 546.

(d) 2 Dow. P. C. (N. S.) 382.

must have heard to some extent, if they are not to proceed *further* to hear. But it is contended in support of the order, that they cannot hear the charge at all, or that, if they have commenced, they must go on to adjudicate in spite of the resistance of the defendant. This is contrary to all analogy, since at common law the course of the inferior tribunal may be arrested, and the proceedings removed at any time before judgment.

Secondly, the expenses which the township are to be reimbursed appear from the face of the order to have been incurred for a longer period than six months preceding the hearing of the application. The order must be construed according to its true purport and meaning, like any other document, and without any intendment in its favour or against it.

Lastly, the order is bad, in directing the payment to be made to the *churchwardens* and overseers. The statute directs the application to be made by the overseers only, and not by the churchwardens and overseers of the parish for an order upon the person whom they charge with being the putative father of the child, to reimburse the parish. But here not only the application is stated to have been made by the churchwardens and overseers, but the money is to be paid to them. The affidavit states there are no churchwardens of the township; how then is the order to be carried into effect? If, on the contrary, by churchwardens, the churchwardens of the parish are to be understood, and the defendant should pay them, the overseers of the township would afterwards say that the payment ought to be made to themselves.

Lord DENMAN C. J.—There is nothing in the first objection. The justices have proceeded with the charge up to the hearing. Application has been made to them by the overseers, and the party charged has appeared before them. The meaning of the expression in the act, that they shall not “proceed further to hear the charge,” is that

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upon the party charged expressing his desire that the charge shall be heard and determined at the quarter sessions of the peace, and entering upon the recognisances required, the justices shall not proceed further, that is, shall not bear the charge, but that all further proceedings in the matter of the charge shall be had before the Court of Quarter Sessions. It would be an anomaly to say that after a man had taken the chance of one tribunal and had proceeded up to a certain point, and saw the case was turning against him, he then should stop short and take the chance of another.

With regard to that part of the order which relates to the payment of the 9s. 4d. to reimburse the township the expense incurred in the maintenance and support of the child from the time of its birth to the time of making the order, we think it clearly bad, and the order must be quashed as far as relates to that sum.

As to the third point, I entertain some doubt, but my learned brothers think the order sufficient in that respect.

PATTESON J.—I agree with my Lord Chief Justice in feeling no doubt at all with regard to the first point. It is necessary to look at the former act. The 72nd section of 4 & 5 Will. 4, c. 76, required the application to be made to the quarter sessions. This was found inconvenient, and it was necessary to remedy the inconvenience by giving parishes an opportunity of applying to the petty sessions. Statute 2 & 3 Vict. c. 85, therefore provides that the justices in petty sessions shall proceed with respect to the application, and shall have all the powers and duties with regard thereunto that are given to the Court of Quarter Sessions by the 4 & 5 Will. 4, c. 76. But then it was also necessary to prevent the party charged from being grieved by the alteration; his right, therefore, to go to the quarter sessions was preserved to him upon certain conditions. But the tribunals are distinct, and, after making his election of one tribunal, he cannot go to the other; he may select which he

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will, but not try both. The analogy of proceedings removed by certiorari from inferior courts does not apply, for this case must be determined on the construction of the act of parliament. If the legislature had intended to give an appeal to the quarter sessions why did it not say so? But the words, shall not proceed further to hear, on the grammatical construction, mean, shall not hear, for up to that point the charge had not been heard. The application for the order is not the hearing of the charge, and up to that point, if the party is desirous that the case should be heard and determined at the quarter sessions, the justices can proceed no further. But if they have proceeded to hear before such desire has been expressed, there is nothing to prevent their adjudicating on the case.

With respect to the 9s. 4d. the order is clearly bad.

As to the third point, I cannot see why the introduction of churchwardens does any harm. If there were churchwardens of the township, an order for the payment by the putative father to the churchwardens and overseers of the township to reimburse the township would be right. The putative father is to reimburse the township; this may surely be done by payment to the churchwardens and overseers, where the former are equally with the overseers trustees for the township. But it is said there are churchwardens of the *parish* of Ripon, but none of the *township*, then an order to pay the churchwardens of the *parish* of Ripon would be bad, but a payment to them would be no compliance with this order. But if there are overseers for the township, but no churchwardens, what difficulty can arise, for the money can only be paid to the overseers, who it is contended are the only parties capable of receiving it?

WILLIAMS J.—As to the jurisdiction of the two justices I have no doubt. The absence from the language of the statute of any mention of any appeal is conclusive in my mind. The obvious meaning of the act is that the party should have his choice. If he is not content to have the

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jurisdiction provided by the act, he may go to the other tribunal. But he cannot have both.

I also quite agree that the order is bad with respect to the 9s. 4d.

I cannot say there is no doubt on the third point. Some has been felt by my Lord. But I doubt the application of the affidavit to it, for it is clear on the face of the order that the justices had jurisdiction, unless they were stopped at a particular point.

If then their jurisdiction is clear, can the affidavit be admitted to shew that the order is bad by reason of something extrinsic? But is the order vitiated by the introduction of the word churchwardens? We know that strictly there is no such officer in a township, and, assuming that there were none here, it is at most only nomen inutile.

Rule absolute as to sum of 9s. 4d.(a)

(a) See the next case.



The QUEEN v. CLARKE and another, Justices of
 Somersetshire.

A party charged with being the putative father of a bastard child, under the 2 & 3 Vict. c. 85, attended before the petty sessions, where after proof of the notice, the case was adjourned on his own application. On his

appearance at the adjournment, the justices refusing to adjourn a second time, he offered to enter into recognisances, under the 3rd section of the statute, to appear at the quarter sessions, but the justices refused to take his recognisance.

Held, that by remaining after such refusal, and proceeding with his defence, he had waived any objection to their jurisdiction.

KINGLAKE, in Easter term last, obtained a rule calling upon the above mentioned justices of the county of Somerset to shew cause why a writ of certiorari should not issue to remove a certain order and judgment, and other proceedings of the said justices in petty sessions, made upon the application of the guardians of the poor of the Wellington Union, against one *Bellet*, as the putative father of a female bastard child born of one *Sarah Twose*, single woman, to reimburse the said Union for the maintenance and support of the said child.

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It appeared from the affidavits that *Bellet* had been served with notice, on behalf of the guardians of the said union, that an application would be made at the petty sessions on the 2d day of November, 1843, for an order upon him to reimburse the said union for the maintenance and support of the said child; that the notice was subsequently countermanded by the guardians, and that upon the 16th of November a second notice was served upon him of a similar application to be made at the petty sessions to be holden 7th of December. That the attorney of the defendant attended the justices on the behalf of *Bellet*, and the attorney for the complainants having duly proved and given in evidence the notice of application on behalf of the guardians, and proved the service thereof upon *Bellet*, the further hearing of the cause was, on the application of *Bellet's* attorney, by consent, postponed till the 4th of January then next. On that day *Bellet* and his attorney attended, together with two sureties, and applied to the justices to take the recognisance of *Bellet* and his sureties, in pursuance of statute 2 & 3 Vict. c. 85, s. 3, *Bellet* being desirous that the said charge should be heard and determined at the quarter sessions of the peace; that the said justices refused to take the said recognisance, and proceeded to hear the application, whereupon the witnesses in support of the charge against *Bellet* were examined upon oath in his presence, and cross-examined by his attorney, who, on the conclusion of the case, addressed the Court in answer to the application.

Godson and *Pashley* shewed cause. If there has been any irregularity here on the part of the justices, the party has mistaken his remedy. He ought to have offered to enter into a recognisance to appear at the quarter sessions before the justices had entered upon the case, and, if they refused to allow this, to have applied to this Court for a mandamus to compel them. But the justices in the present instance had jurisdiction. They were not stopped in

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time; the case had been partly heard, and was in the first instance adjourned at the instance of the defendant's attorney. Instead of applying for that adjournment, he ought then to have expressed his wish to have the case heard at the quarter sessions, and to have tendered his recognisance. But it was not until an application for a second adjournment had been refused, that this was done. The justices were then in possession of the case, and their jurisdiction had attached. Besides, after this, the defendant's attorney submitted to the jurisdiction by proceeding to cross examine the witnesses, and addressing the Court. By such a course he waived any objection to the jurisdiction; *Brunskill v. Giles*(a), *Farwig v. Cockerton*(b), *Coose v. Neumegen*(c). The defendant is therefore too late to take the objection, as he in fact has waived it at the hearing, and there is nothing on the face of the proceedings to shew want of jurisdiction in the justices; *Reg. v. Justices of Cheshire* (d).

Carrow contra. This is not like *Reg. v. Orley*(e), where the case had been part heard before the defendant offered to enter into a recognisance to appear at the quarter sessions. The fallacy consists in assuming that any thing more was done on the first occasion than proving the notice upon the party charged with being the father of the child. Up to that time the defendant had the right of withdrawing from the jurisdiction of the petty sessions, and having his case heard at the quarter sessions. The adjournment made no difference, but on his second appearance he was in the same position, and the justices were bound to take the recognisance when tendered. Upon their refusal, a want of jurisdiction ensued, which no subsequent assent of the party could supply. Where there is an original want of jurisdiction, it can never be given by

(a) 9 Bing. 13.

(b) 3 M. & W. 169.

(c) 9 M. & W. 290.

(d) 8 Ad. & Ell. 398; S. C. 3 P. & D. 88.

(e) *Ante*, p. 278.

the consent of the parties; *Lawrence v. Willcock*(a), *Lismore v. Beadle*(b).

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LORD DENMAN C. J.—This person cannot now be permitted to say that the justices have no jurisdiction. He first applies for and obtains an adjournment of the case, and then at his second appearance, on the refusal of the justices to adjourn the case again, or to take his recognisance to appear at the quarter sessions, he stays and examines the witnesses, and addresses the Court. This is a clear waiver; he should have declined their jurisdiction in the first instance.

PATTESON J. concurred.

COLERIDGE J.—I am of the same opinion; I think it a clear waiver on the point put by Mr. *Godson*, that here the justices clearly had jurisdiction, to which the party charged submitted. If the jurisdiction once attached, he waived his right of going before another tribunal. It is not like the case of an absence of all jurisdiction, which cannot be cured by the act of the party.

Rule discharged(c).

(a) 11 Ad. & E. 941; S. C. 3
P. & D. 536.

(b) 1 Dowl. P. C. (N. S.) 566.

(c) See the preceding case.

The QUEEN v. The Justices of MIDDLESEX (St. JOHN the BAPTIST, STAMFORD, v. St. PANCRAS.)

IN this case it was decided by the Court, that in the county of Middlesex (which has four general and four quarter sessions,) the appeal against an order of removal must be to the quarter sessions. But now by 7 & 8 Vict. c. 71, s. 2, it is enacted, that the general sessions “shall have power to try and determine all appeals, and all other

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powers which now or shall hereafter belong to the general quarter sessions." And by sect. 3, that "all orders heretofore made, and all things heretofore done, at any general sessions of the peace for the county of Middlesex, shall be as good in law as if made and done at the general quarter sessions of the peace for the same county."

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The QUEEN v. The Inhabitants of LATCHFORD (a).

The examination of a pauper, after stating a birth settlement in the appellat parish, went on also to state that the pauper was by indenture bound apprentice in the respondent parish, and that during the apprenticeship he resided sometimes in the respondent and sometimes in the appellat parish.

The grounds of appeal

alleged that the order was bad on its face, and that the pauper was settled in the respondent "parish, by having been apprenticed as in the said examination stated," and by having served and resided, &c. in the respondent parish.

Held, 1. That the statement in the examination, as to the apprenticeship, did not necessarily shew a merger of the birth settlement so as to preclude the respondents, on the trial of the appeal, from going into evidence of the birth settlement and relying on that only, for the removing justices might have disbelieved the evidence with respect to the settlement by apprenticeship.

2. That the appellants, who endeavoured to prove a settlement by apprenticeship in the respondent parish, in answer to the birth settlement, were bound to prove the indenture of apprenticeship, as a necessary part of their own case, and that this was not admitted by the respondents merely because stated in the examinations and not traversed in the grounds of appeal.

3. The form of the judgment of this Court, on a case sent from sessions, is simply to make absolute or discharge the rule for quashing the order of sessions; but, if the rule is discharged, the effect of the judgment is to confirm the order of sessions, and to fix the costs on the party bringing up the case, under stat. 5 Geo. 2, c. 19, s. 2.

ON appeal against an order for the removal of *Peter Carter*, &c., from the township of Warrington, in the county of Lancaster, to the township of Latchford, in the county of Chester, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The material part of the examinations on which the order was made was as follows:—*Richard Carter*, the father of the pauper, stated that the pauper was born in Latchford in 1816. *Peter Carter*, the pauper, said, "on the 16th of February, 1835, being then upwards of eighteen years of age, I bound myself, with the consent and approbation of *Richard Carter*, my father, to *John Gregory*, of the township of Warrington, cordwainer, for and until the full end and term of five years, under a legally stamped


(a) Decided in Mich. T. 1844 (Nov. 30).

indenture, which said indenture was duly signed by myself, my said father and my master, in the presence of each other, and in the presence of *Joseph Worrall*, of Warrington, who witnessed the same. The indenture now produced is the one under which I was bound an apprentice. I served my said master under the said indenture from the day of the date of the said indenture, on and until the evening of Saturday, the 23d of December, 1837, when I left my said master's house, about eight o'clock in the evening of the said 23d of December. During the time I served my said master, under the said indenture aforesaid, I resided and slept at the house of my said father, in the township of Latchford, in the county of Chester, in the summer months, and on the Saturday and Sunday evenings of the winter months, and during the remainder of the winter months, for five nights in each week, I resided and slept in the township of Warrington, in the county of Lancaster. I resided and slept in the township of Latchford, in the county of Chester, for more than forty days, during which time I served my said master under the indenture aforesaid, and I resided and slept in the township of Warrington for more than forty days, during which time I served my said master under the indenture aforesaid. After I had served my said master under the said indenture, on the 23d of December, 1837, I went and slept at the house of my said father, in the township of Latchford aforesaid, on the evening of the said 23d of December, and I continued to live and sleep at the house of my said father for upwards of two years after the said 23d of December, until I married, &c. about three years ago. I was twenty-one years of age on the evening of the 24th day of December, 1837, and I never served my said master under the indenture aforesaid after the 23d day of December, 1837, &c."

The indenture of apprenticeship referred to in the examination was proved before the justices, and a copy thereof sent to the appellants with the examinations.

The following were the material grounds of appeal:—

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“ That the order and examination are bad on the face thereof; that the examination was and is insufficient, and does not contain legal evidence of any settlement having been gained by the paupers, or any of them, in our township of Latchford; that the said paupers were, at the time of making the said order, and still are, legally settled in your said township of Warrington; by reason of the said pauper, *Peter Carter*, having been apprenticed, as in the said examination is stated, and having served under the said indenture of apprenticeship, in the said township of Warrington, for more than forty days, and having slept in the said township of Warrington for more than forty nights during such service, and on the last night thereof; and by reason of the said township of Warrington being the last place in which the said pauper, *Peter Carter*, completed the period of forty days' service and residence under the said indenture of apprenticeship.”

On the appeal coming on to be tried, the appellants applied to the Court to quash the order, on the ground of the insufficiency of the examinations to sustain it, or to entitle the respondents to go into evidence in support of it, inasmuch as the examinations shewed that a settlement by apprenticeship had been gained by the pauper, *Peter Carter*, in the township of Latchford, or else in the township of Warrington, whereby the birth settlement of the same pauper mentioned in the examinations was merged or destroyed; and that the examinations did not shew that the said settlement by apprenticeship had been gained in Latchford.

The Court refused the application, and the respondents having proved that the pauper, *Peter Carter*, was born in the township of Latchford in 1816, stated that they should rely on the birth settlement so proved, and closed their case; upon which the appellants applied to the Court to quash the order, on the ground that the respondents having in these examinations averred an apprenticeship of the pauper, *Peter Carter*, with a service under it, and residence

during such service, sufficient to confer a settlement either at Latchford or else in Warrington, which apprenticeship was admitted, and which service and residence were not denied in the appellant's grounds of appeal, the birth settlement had been superseded or destroyed by the settlement by apprenticeship, and that the respondents having relied on the birth settlement had failed to support their order. The Court ruled against the application, and called on the appellants to go into their case.

The appellants then called the pauper, *Peter Carter*, who proved that he had served *John Gregory*, of Warrington, from the 16th day of February, 1835, until the evening of Saturday, the 23d day of December, 1837; that, during the time he served, he resided and slept in Latchford in the summer months, and in Warrington in the winter months, and that during such service he had slept more than forty days in each of those townships; that he slept in Warrington on the night of Friday, the 22d December, 1837; that when he left his master's house on the evening of Saturday, the 23d December, 1837, he had resolved not to return to his service under his apprenticeship, and that for a year previously he had fully determined to vacate his apprenticeship as soon as by law he should be able to do so.

This being the appellants' case, the respondents contended that it failed, inasmuch as no apprenticeship had been proved, the indenture not having been produced, or its non-production accounted for. The appellants contended that the valid binding of the pauper, *Peter Carter*, to the said *John Gregory*, by indenture of apprenticeship, of which a copy was set out in the examinations, having been averred in the examinations by the respondents, and having been admitted by the appellants in their grounds of appeal, was so admitted for all purposes of the trial, and that the appellants could not be required to prove such binding.

The Court found that the said *Peter Carter* served his apprenticeship with the said *John Gregory* from the 16th day of February, 1835, till the 23d day of December, 1837;

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that he slept in Warrington on the 22d day of December, 1837, and slept and inhabited in Warrington aforesaid more than forty days while so serving the said *John Gregory* under the said indenture, and attained his majority and avoided his apprenticeship on the 23d day of December in the same year, and that Warrington was the place of his last legal settlement acquired under the said indenture; but the Court ruled that the fact of the said *Peter Carter's* having been bound apprentice to the said *John Gregory* was not admitted on the examinations and grounds of appeal, so as to render proof thereof by the appellants unnecessary, and therefore confirmed the order, subject to the opinion of the Court of Queen's Bench on the following points; that is to say,

First, whether the examinations were sufficient to entitle the respondents to go into their case.

Secondly, whether the fact of the said *Peter Carter* having been bound apprentice to the said *John Gregory* was admitted on the examinations and grounds of appeal, so as to render it unnecessary that the appellants should prove the binding.

If the Court shall be of opinion that the examinations are not sufficient to entitle the respondents to go into evidence in support of the order, or if the Court shall be of opinion that the fact of the said *Peter Carter's* having been bound apprentice to the said *John Gregory*, was admitted by the examinations and grounds of appeal, so as to render proof of the fact by the appellants unnecessary, then the said order is to be quashed, otherwise confirmed.

Crompton in support of the order of sessions. 1. The examinations were sufficient to entitle the respondents to go into evidence in support of their order. It was necessary that the whole history of the pauper should be gone into before the removing magistrates, for the purpose of ascertaining the place of his last settlement. A good birth settlement is shewn in the appellant parish, and there is

also imperfect evidence of a subsequent settlement by apprenticeship. The adjudication, therefore, of the birth settlement is supported by the evidence; and, even if there were complete evidence of the subsequent settlement, this would not invalidate the order of removal, for the justices may not have believed the latter evidence.

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2. It is said that the execution of the indenture of apprenticeship is admitted so as to dispense with proof of it by the appellants. But by whom is it admitted? Not by any party to the appeal, but by a witness examined before the appeal is instituted. An admission even by a party to a suit, of the execution of an instrument, will not dispense with regular proof of the execution. This doctrine was not shaken in *Slatterie v. Pooley* (a), for there the admission related to the contents, and not to the execution of the instrument.

Pashley contra. 1. The examinations are clearly bad, for they shew that the settlement by birth was extinguished by a subsequent settlement, which, as appears from *Rex v. Ribchester* (b), would be in Warrington, where he slept during the last night of his apprenticeship, for on the Saturday night when he slept in Latchford the apprenticeship was at an end. In *Rex v. St. Mary, Beverley* (c), a married woman was removed to her maiden settlement. Upon the trial of an appeal against the order of removal, the respondents proved the maiden settlement in the appellant parish, and also that the husband was born in Ipswich, where there are several parishes, but in which of them did not appear. It was held that the respondents had disproved the settlement in the appellant parish by the evidence given of the husband's birth settlement, notwithstanding the uncertainty as to the exact place of his birth.

2. The appellants were not called upon to prove the

(a) 6 M. & W. 664.

(c) 1 B. & Ad. 201.

(b) 2 Mau. & S. 135.

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execution of the indenture, which was stated in the examinations, and as to which no issue was taken in the grounds of appeal. The object of the recent decisions in this Court has been to bring the litigating parishes to a precise issue, so that they may always be prepared for the real question to be tried. The indenture is not traversed in the grounds of appeal, and is therefore admitted. [*Coleridge J.* How can you narrow your proof by your own grounds of appeal? Suppose the appellants had said in their grounds, "We deny the birth settlement on which you, the respondents, rely, but we admit the apprenticeship settlement, which is in our favour."] In *Reg. v. St. John's, Margate(a)*, the grounds of appeal objected, to a settlement by apprenticeship, that the premium had been paid by the parish officers, and that the statutory requisitions in such a case had not been complied with, and it was held that the execution of the indenture was admitted. Lord *Denman C.J.* observed in his judgment in that case, "Where particular facts are specified and disputed, all other facts alleged in the examination are admitted." It must be remembered also that the appellants would have to pay the costs occasioned by any unnecessary traverse. Suppose the grounds of appeal had in terms proceeded thus, "The appellants admit the pauper was bound apprentice as alleged in the examinations, but the pauper during the term resided out of the appellant parish, so that there is no settlement there by apprenticeship." That would be a good ground of appeal, and would narrow the issue, so as to dispense with proof of the indenture; if not, the appellants must always traverse everything. [*Coleridge J.* The respondents must send all the examinations, whether they rely upon them or not, and they have no replication to the grounds of appeal.] The examinations are the grounds on which the respondents rely, and they are as much bound by them as a party is by the contents of an affidavit which he uses: *Brickell v.*

(a) 1 Q. B. 252; S. C. 4 P. & D. 653.

Hulse (a). *Slatterie v. Pooley* (b) was recognised in *Howard v. Smith* (c).

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LORD DENMAN C. J.—I have no doubt whatever on the first point. The respondents were certainly entitled to go into proof of their case. If any settlement is stated they may prove it. The examinations may state several settlements. We cannot tell which the removing justices believed and acted on; the respondents may prove any one of the settlements.

With regard to the point made as to the admission, I must own that I am not quite satisfied with what has been done, for I think the appellants may have been led to suppose that the only question on the apprenticeship would be as to the residence. I should have liked the case much better if the appellants had been told that the respondents did not mean to admit the indenture. Still I cannot say the respondents were bound to give such a notice. If the statements in the examinations and grounds of appeal had been made in conversation between the attorneys for the contending parishes, there might have been good ground for postponing the trial to prevent surprise. But as the act requires merely that the examinations and grounds of appeal should be sent on either side, I think it is sufficient for the respondents to prove any settlement that appears in their examinations, and that, if the appellants rely on any other settlement, they make it their own case, and must prove it in the ordinary way.

WILLIAMS J.—I am quite of the same opinion as to the first point.

As to the second point, I think it a perversion of terms to call the examinations an admission by the respondents. They have no resemblance to an admission. This Court requires that all the examinations should be sent. The

(a) 7 A. & E. 454; S. C. 2 N. & P. 426.

(b) 6 M. & W. 664.

(c) 3 M. & G. 254.

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respondents may have taken the pauper before the justices in order that he might prove the birth settlement and nothing more, and all the rest of his evidence may have been extracted from him by the justices. If the respondents are not only to send, but also to be bound by all the examinations, the statements of a witness over whom a party has no control would be assimilated to a statement by himself. If the appellants meant to rely on the settlement by apprenticeship, they should have been prepared to prove their case. The respondents certainly have not admitted any part of the case set up against them. Even if the examination is to be taken as their language, it means no more than this, "We will give evidence of a birth settlement, and, if we fail in that settlement, we will try another."

COLERIDGE J.—The first question is, whether the respondents were entitled to go into their case of a birth settlement. The examinations contain good evidence of a birth settlement. The answer therefore to the first question would be simple, if the examinations stopped there. But it is said that they go on to disclose a settlement by apprenticeship, and so to extinguish the birth settlement. But the justices have removed upon the birth settlement. Are the respondents then to be precluded from supporting the very settlement on which the justices have removed? The indenture might not have been properly stamped, or there might have been some informality with respect to the premium. I think, therefore, the respondents were properly allowed to go into their case of birth settlement.

As to the second point I have no doubt whatever. I am desirous that the statute, which requires the examinations and grounds of appeal to be communicated on either side, should be carried out with the utmost good faith: but we should not go beyond this. The respondents must send all their examinations, whether they make for or against them, but by doing so they do not admit any thing. The appellants by their grounds of appeal may, as against themselves, admit any part of the examinations, and, by doing

so, cannot compel the respondents to admit, and say "you shall dispute nothing which we have not disputed." If the appellants could force their own admission on the respondents, the appellants would in a case like the present, if they knew there was something wrong about the indenture, merely have to take issue on the residence only in order to get out of proving what they knew they could not prove.

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WIGHTMAN J.—I am of the same opinion. The question whether there is enough on the face of the examinations to let the respondents into proof of their case is too clear for argument. But it is said the examinations contain the statement of another settlement, which is destructive of the birth settlement, and that by sending such a statement the appellants have admitted its truth. But this statement is no averment of the respondents. They may have relied on the birth settlement exclusively, and the pauper may have gone on to give evidence of that which they themselves cared nothing about. It is too much to say, because the respondents send all the examinations, as they are bound to do, that therefore they admit them all to be true, and are estopped from contradicting them.

Pashley then applied to the Court simply to discharge the rule for quashing the order of sessions, and to confirm the order of sessions, observing that the first mentioned form of judgment would leave each party to pay his own costs.

Lord DENMAN C. J.—The statute 5 Geo. 2, c. 19, s. 2, enacts that no certiorari shall be allowed to remove any judgment of quarter sessions, "unless the party or parties prosecuting such certiorari, before the allowance thereof, shall enter into a recognisance, &c. with condition to prosecute the same at his or their own costs and charges, with effect, &c., and to pay the party or parties in whose favour and for whose benefit such judgment or order was given or made, within one month after the said judgment or order

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shall be confirmed, their full costs and charges, to be taxed according to the course of the court where such judgments or orders shall be confirmed." All we have to do is to discharge the rule for quashing the order of sessions. That is the form of our judgment, the effect is, that the order of sessions is confirmed, and the appellants who have brought it up have to pay the costs. Those who bring up orders of sessions should bear in mind that they do so at the peril of paying costs.

Rule discharged.

The QUEEN v. ROSE (a).

By stat. 5 & 6 Will. 4, c. 50, s. 27, the surveyor of the highways is directed to make a rate on all property liable to be rated to the relief of the poor, "provided that the same rate shall also extend to such woods, mines and quarries of stone, or other hereditaments, as have heretofore been 'usually rated' to the highways."

Held, on a question as to the liability of certain woods in a parish to the highway rate, that the words "usually rated" meant "usually rated" in that particular parish.

ON appeal by *H. P. Powys* against a rate made in November, 1843, by the defendant, as surveyor of the highways in the parish of Whitchurch, in the counties of Oxford and Berks, in which rate the appellant was rated (inter alia) for "woodland 48*l.*," the sessions amended the rate by striking out the above item, subject to the opinion of this Court upon the following case:

The appellant from the year 1838, up to and at the time of the making of the rate appealed against, was the occupier of certain timber woods within the parish of Whitchurch, the same not being saleable underwood within the intent and meaning of the act of the 43 *Eliz.*, and being property which, at the time of the passing of stat. 5 & 6 Will. 4, c. 50, and also at the time of making of the said rate, was not liable to be rated and assessed to the relief of the poor. From the year 1809, down to and including the year in which the said act of 5 & 6 Will. 4, c. 50, was passed, the said timber woods had not been rated to the highways of the said parish of Whitchurch. Since the passing of that statute, the appellant, as surveyor of the highways under the said last mentioned statute, for the year

(a) Decided in Trin. Term, 1844 (June 5).

1840, rated himself in respect of the said timber woods, and paid such rate.

Timber woods of a similar description to those occupied by the appellant have always been rated to the repairs of the highways in the majority of the parishes in the county and neighbourhood, but in some they have not been so rated since the year 1809.

It was admitted that, if the appellant was rateable in respect of the woods in question, the amount of the rate was fair, and the only question between the appellant and the respondent was, whether the appellant was rateable in respect of such timber woods.

If the Court shall be of opinion that the appellant was so rateable, the order of sessions to be quashed. If the Court shall be of opinion that the appellant was not so rateable, then the order of sessions to be confirmed.

Walesby appeared to support the order of sessions, but the Court called upon

Keating and *Phinn* contra. The question turns upon the meaning of the 27th and 33d sections of the Highway Act, stat. 5 & 6 Will. 4, c. 50. The 27th section enacts, "that a rate shall be made, &c. by the surveyor upon all property now liable to be rated and assessed to the relief of the poor; provided that the same rate shall also extend to such woods, mines and quarries of stone, or other hereditaments, as have heretofore been *usually rated* to the highways." The 33d section enacts, "that when property, or the owner or occupier in respect thereof, has, previous to the passing of this act, been *legally exempt* from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the rate hereby imposed." It appears that the woods in question have been "usually rated" to the highways in the majority of the parishes in the county and neighbour-

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hood. If, therefore, the words "usually rated" refer to the usage in the county or neighbourhood, the appellant is brought within the 27th section of the Highway Act; and he cannot bring himself within the exemption of the 33d section, for by stat. 13 *Geo. 3*, c. 78, s. 34, all occupiers of woods were liable to the highway rate, and stat. 34 *Geo. 3*, c. 74, s. 4, regulates their proportion of statute duty. The woods in question therefore appear, on reference to the last mentioned statutes, to have been "usually rated" throughout the whole kingdom, and not merely throughout that particular neighbourhood, if the words "usually rated" are to be read as "rateable," which they may well be. [*Patteson J.* Otherwise woods planted after the passing of the act, or newly imported trees might not be rateable.] So that if "usually rated" refer, as it must do, to the time of the passing of the act, it may happen that in time no woods will be rateable unless the words apply to the species of wood, which would still include trees not previously planted in the particular parish. It will be contended for the appellant, that the word "usually" is to be limited by the usage of this particular parish. But it seems very improbable that it was intended to make the law, which was uniform throughout the whole kingdom up to the passing of the Highway Act, thenceforth vary according to the particular practice of individual parishes, so that wheresoever, in any particular parish, either from accident or from the circumstance that it has been unnecessary to enforce such a contribution, owners of woods happen not to have been rated to the highways for some years past, there they are to enjoy a legal exemption for ever afterwards. The case states that these woods have not been rated since the year 1809; perhaps this may be explained by the circumstance that *Aubrey v. Fisher*(a), in which a question was raised with respect to the liability of young beech trees to the poor rate, was decided in that year; and in many parishes afterwards the highway rates were framed from the poor rate.

(a) 10 East, 446.

Walesby contrà was stopped by the Court.

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LORD DENMAN C. J.—We are called upon to construe the 27th section of the Highway Act, and I much fear that we cannot construe it satisfactorily. The language of the section may appear to assume that there were, at the time of the passing the act, particular woods which were not rated to the highways, whereas by a former act all woods were rateable. I think we should take the words “usually rated” to mean “usually rated” in each particular parish. In this sense it appears from the case that the woods in question have not been usually rated, and the appellant therefore is not liable. I do not come to this conclusion with any satisfaction, but the words of the statute will bear our construction, and it is one of no very difficult application in practice.

PATTESON J. concurred.

WILLIAMS J.—For the appellant it is proposed to read the word “rated” as “rateable.” I think it ought not to be so read; and, if we read it as actually rated, the usage will be best ascertained by reference to the practice of the particular parish.

COLERIDGE J.—I agree with the rest of the Court, though not without doubt. But on the whole, as we cannot arrive at a very satisfactory conclusion, I think we should adopt that construction which is, at all events, a literal construction, and the least difficult of application.

Order of Sessions confirmed.



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(WASHTON v. LEEDS (a).)

1. Where husband and wife are living together, and the husband has no settlement, the wife cannot be removed to her maiden settlement, unless her consent appears upon the examinations.

2. The first examination, on which an order for the removal of a wife and children to her maiden settlement was founded, was the examination of her husband. It purported by its heading to have been taken "touching the place of his lawful settlement," and stated that no such settlement could be ascertained; the succeeding examinations of other witnesses purported, by their respective headings, to have been taken "at the time, place, and in the manner aforesaid."

On an objection, that an inquiry, which appeared by the heading of the first examination to relate to the husband's settlement, could not justify the removal of such children as were above the age of nurture to the maiden settlement of the wife:—

Held, that the heading sufficiently shewed jurisdiction to make the order, as an inquiry into the husband's settlement was the foundation of the proceedings, for, until it appeared that his settlement could not be ascertained, the wife's settlement was immaterial, and, when it did so appear, the rest of the inquiry followed as of course.

3. The examination of a pauper stated that his parents had no settlement, and that he did not know the place of his birth, though he had made search to ascertain it; and the examination of another witness also stated that search had been made by him for the same purpose, but without effect.

Held, 1. That the particulars of the search need not be stated.

2. That the pauper's children above the age of nurture might be removed to the wife's maiden settlement, without negating his having been born in Scotland or Ireland, &c. so as to shew that they were not removable to those countries under stat. 3 & 4 Will. 4, c. 40, s. 2.

ON appeal against an order of two justices for the removal of *Lydia Morgan* and her four children, two of them being above the age of nurture, from the township of Leeds to the township of Washton, both in the county of York, the sessions quashed the order, subject to the opinion of this Court on the following case:—

The examinations, on which the order was founded, were the following:

"Borough of Leeds, in the county of York.—The examination of *John Morgan*, of Leeds, taken upon oath, &c. touching the place of his lawful settlement, who saith as follows:—

"I have a wife, called *Lydia*, whose maiden name was *Lydia Miller*; I have four children (b), &c. &c.; all of whom are unemancipated, and never gained settlements for themselves, &c.; I am now living, residing and inhabiting with my said wife and children, in, and we are now actually chargeable to, the township of Leeds. I never gained a settlement in my own right; my father and mother

(a) Decided in Trinity Term, 1844 (June 3).

(b) Two of the children were above the age of nurture.

were called *James Morgan* and *Ellen Morgan* ; I never heard where they were married. They neither of them ever gained settlements in England, or had any place of settlement in England to my knowledge or belief, either derivative or acquired ; I never knew the place of my birth, though I have made diligent search and enquiry to ascertain it ; my father died about twenty-four years ago, and my mother about eight years ; I am now aged thirty-two years. In the month of October last I assisted *George Smith* in endeavouring to discover my place of settlement, and inquiry after the place of settlement, if any, of my father and mother ; and we inquired of all persons and searched in all likely places to find a place of settlement for me, and I believe I never had any. *I hereby consent* and agree that my said wife and children shall, without me, be removed to the township of Washton, that being the last place of her maiden settlement at and immediately before my intermarriage with her ; and I pray that such removal may be forthwith ordered and made according to law.'

" The examination of *Lydia Morgan*, taken upon oath at the time, place and in the manner aforesaid ; who says as follows :—

" ' I am the wife of the above-named *John Morgan* ; I never gained a settlement for myself ; I am now aged thirty-two years, the lawful daughter of the undermentioned *John Miller*.'

" The examination of *John Miller*, taken upon oath, at the time, place and in manner aforesaid, who says :—

" ' The above-named *Lydia Morgan* is my daughter, and was born in lawful wedlock. She is my daughter by my present wife.' [*Miller* then went on to state that his own settlement, a derivative one, was in Washton.]

" The examination of *George Smith*, one of the overseers of the poor of the township of Leeds, in the said borough, taken upon oath, &c., touching the last place of the legal settlement of *John Morgan* and *Lydia*, his wife, and their children, who saith, as follows :—

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“ ‘ I have, together with the said *John Morgan*, made diligent search and inquiry with the object of discovering and ascertaining whether the said *John Morgan* hath any legal settlement ; and I have not been able to discover or ascertain that the said *John Morgan* hath, either by his own act, or the act of his parents or their ancestors, or otherwise, acquired any settlement, or, if any such settlement have been acquired, I verily believe it is not known, and cannot in any manner be ascertained.’ ”

The following were the grounds of appeal on which the appellants relied :—

1. That the examinations do not shew that any search or inquiry has been made by the overseers of the poor of the township of Leeds, or by any of them, or by any person or persons on their behalf, or by any person or persons whatever, to ascertain whether the said *John Morgan* is a person born in Scotland, or Ireland, or in the Isle of Man, or Scilly, or in either of the Isles of Jersey or Guernsey.”

2. “ That the examinations do not shew in what places or in what manner *John Morgan* and *George Smith* searched for a place of settlement in England of *John Morgan*, or that they, or either of them, searched in those places in England in which *John Morgan* and his parents had resided, or that they or either of them made a proper or sufficient search.”

3. “ That, although the examinations shew that *Lydia Morgan* and her said children were living with her said husband in the township of Leeds at the time when the examinations were taken, yet it does not appear on the examinations that the pauper *Lydia Morgan* consented to be removed to the township of Washton, or consented to be removed at all without her husband.”

4. “ That the examinations are informal, insufficient and bad in respect of other matters besides those to which the preceding grounds of appeal relate ; and that the examinations do not shew a good and sufficient cause for the removal of the paupers from the township of Leeds to the township of Washton.”

5. "That the examinations, whereon the order of removal was made, were not duly taken by the two justices by whom the order of removal was made."

When the appeal came on to be heard, the appellants insisted that the examinations were insufficient to warrant the order, on the third ground of appeal above stated; they also claimed a right to insist, under the fourth and fifth grounds, that the order ought to be quashed, inasmuch as it appeared, on looking at the examinations, including the headings thereof, that the examinations of *John Morgan*, *Lydia Morgan*, and *John Miller*, were not taken in the matter to which the order relates, and that the remaining examinations were insufficient to support the said order.

On the objections taken under the third, fourth and fifth grounds of appeal, the Recorder quashed the order, subject to the opinion of the Court of Queen's Bench.

The appellants also insisted that the examinations were insufficient to warrant the order, on the first and second grounds above stated. The Recorder expressed an opinion against these objections, but gave leave to the appellants to include those other grounds in the case.

If the Court of Queen's Bench shall be of opinion that all the objections so taken by the appellants ought to have been overruled, then the order of sessions to be quashed, and the order of removal to be affirmed. If the Court shall think the objections, or any of them, fatal to the order of removal, then the order of removal to stand quashed, and the order of sessions to be affirmed.

Bliss and *Stapleton* in support of the order of sessions (a).

R. Hall and *Pashley* contra.

Cur. adv. vult.

(a) Before Lord Denman C. J., *Patteson*, *Williams* and *Wightman* Js., in Easter Term, 1844 (April 20).

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Lord DENMAN C. J., on a subsequent day (a), after observing that a question had been raised in this case as to the authority of *Rex v. Eltham* (b), said it was not necessary to consider that question, as it did not appear that the wife had consented to the separation.

R. Hall afterwards applied to have so much of the order of sessions quashed as relate to the children above the age of nurture.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—In this case the order of sessions was confirmed on the single ground that the wife had not consented to be removed without her husband, and that at all events such consent was necessary to a valid removal, assuming that it would be valid under any circumstances. The Court did not then recollect that this ground of decision does not apply to two of the children, who are above the age of nurture: as to them it becomes necessary to consider the other points of the case.

One of them arises upon the examinations of the father and mother and one *Miller*, which it is said were taken, as appears by the heading “touching the lawful settlement of the father,” whereas the order of removal is of the wife and children, to the wife’s maiden settlement, and the examinations should have been headed accordingly. We think that this point is not tenable. An inquiry into the father’s settlement was necessary in this case, and was the foundation of the proceedings, for, until it appeared that his settlement could not be discovered, the wife’s settlement was immaterial, and, when it did so appear, the rest of the inquiry followed as of course. The heading of an examination may doubtless be important with regard to an indictment for perjury, and for the purpose of shewing that it was taken in a matter in which the justices had jurisdiction.

(a) May 10th, 1844.

(b) 5 East, 113.

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Here the heading sufficiently shews jurisdiction, and it is true so far as it goes, for there was an inquiry touching the settlement of the father, but there was also a further inquiry arising out of the first inquiry, which is not noticed in the heading. If that further inquiry had been unconnected with the first, the case would have been very different, but, as it is, we think it to have so naturally arisen out of that first inquiry, that we must hold the examination to have been sufficiently taken and headed.

The second point is also untenable. It appears from the examinations that diligent inquiries were made to ascertain the father's settlement: the precise nature of those inquiries need not be stated. Then it is said that the examinations do not negative the father's having been born in Scotland or Ireland, or Scilly, Guernsey or Jersey. The answer is, that they shew it is not known where he was born. It is obviously impossible to negative his birth in the places mentioned, except by shewing where he was born. It would be absurd to require a search in every town and village in Scotland, Ireland, &c.; and, even if such search were made, the result would be anything but certain. The same answer applies as to the supposed necessity for searching every parish register in England.

We are therefore of opinion that the order of removal is good, and ought to have been confirmed, so far as regards the two children above the age of nurture, and that to that extent the order of sessions ought to be quashed, but to remain confirmed as regards the wife and the other children, and the rule of this Court must be amended accordingly.

Order of Sessions quashed as to part, and confirmed
 as to the residue accordingly (a).

(a) See the next case.



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The QUEEN v. The Inhabitants of YELVERTOFT (a).

In the examinations on which an order was made for the removal of a pauper from a parish in Leicestershire to a parish in Northamptonshire, as being the place of his settlement ex parte maternâ, the pauper's father stated, "I am upwards of sixty-four years, and was born in London, I believe."

Held, no objection to the examinations that they did not shew any inquiry into the derivative settlement ex parte paternâ.

ON appeal to the Northamptonshire Quarter Sessions against an order for the removal of *Charles Page*, the younger, &c., from the parish or township of Blaby, in Leicestershire, to the parish or township of Yelvertoft, in Northamptonshire, the sessions confirmed the order, subject to the opinion of this Court upon the following case:

Two justices, by their order, dated 14th October, 1843, removed *Charles Page*, jun., together with his wife and their four children, from Blaby, in the county of Leicester, to Yelvertoft, in the county of Northampton. The examinations, so far as they were material to this case, were as follows:

First, the examination of the pauper to the effect that he had gained no settlement in his own right.

Second. *Charles Page*, senior. "I believe I am upwards of sixty-four years of age, and was born, I believe, in London, but in what parish I never heard. I was brought up by my grandfather at Yelvertoft, in the county of Northampton, from about the age of two and a half years, and never saw my parents above three or four times afterwards, and don't know where they belonged. I have never done any act to gain a settlement in my own right. I was married at Yelvertoft church, &c., to *Catherine York*, single woman, by whom I had six children, &c."

Third. *Thomas York*. "My daughter, *Catherine* (the wife of *Page* senior), was born at Yelvertoft, &c."

The grounds of appeal were, first, that the said order and examinations, whereon the same were founded, and the notice thereof, are informal and bad on the face of them, because the pauper, *Charles Page* the younger, appears in and by the said examinations to be removed to his derivative settlement ex parte maternâ, while it does not appear that any due examination or inquiry has been made to

(a) Decided in Hilary Term, 1845 (Jan. 22).

ascertain that the pauper had no derivative settlement ex parte paternâ, but, on the contrary thereof, *Charles Page* the elder, the father of the pauper, states his belief that he, *Charles Page* the elder, was born in London, and no primâ facie evidence was given that he was not there born, or that he acquired no birth settlement thereby.

The sessions held that the examinations were sufficient in respect of the objections taken on the first ground of appeal. The sessions confirmed the said order, subject to the opinion of the Court of Queen's Bench.

K. Macaulay and *Simpson* in support of the order of sessions. It is objected that the pauper could not be removed to his maternal settlement until it had been ascertained that he had no paternal settlement. But a primâ facie case is always made out by the proof of any settlement whatever, and it is for the parish in which such a settlement is proved to get rid of it, by shewing it to be superseded by some other settlement. In *Rex v. St. Mary, Beverley (a)*, a wife was removed to her maiden settlement, and on appeal it appeared that her husband was born in Ipswich, where there are several parishes, but in which of them did not appear, and it was held that the order of removal was bad. But there the primâ facie case was rebutted, for it appeared that the wife had a settlement in right of her husband, although it did not appear in what parish. Here there is no evidence whatever that the pauper's father had any settlement. The father states his own belief that he was born in London, and that is all. If it be said that such a statement rendered it necessary to inquire in what parish in London the pauper was born, the answer is, that it would be quite futile to inquire throughout London where an old man of sixty was born. On removal of a wife, it is enough in the first instance to prove her maiden settlement: *Rex v. Ryton (b)*, *Rex v. Woods-*

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(a) 1 B. & Ad. 201.

(b) Cald. 39.

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ford (a), *Rex v. Edisore* (b), *Rex v. Harberton* (c), *Rex v. Westerham* (d). Even if it had been clear that the father had been born somewhere in London, he might have been born in some extra-parochial place. The appellants must contend that there is a presumption of law that every man has a settlement. If that were so, there never could be a good removal to a birth settlement, without inquiring into the settlement of the father, and, after ascertaining that the father had a birth settlement, it would be necessary to go on and shew that he had no derivative settlement from the grandfather, and the inquiry would be interminable. The recent case of *Reg. v. Leeds* (e) is an authority to shew that a *prima facie* case will support an order of removal. In *Rex v. St. Mary, Leicester* (f), it was held that, as against the birth settlement relied upon by the respondents, proof of the mother's maiden settlement was sufficient to invalidate the order. Lord Denman C. J. observed in that case, "My first impression was that, upon the authority of the rule laid down in *Rex v. St. Matthew, Bethnal Green* (g), it was incumbent upon the appellants to prove either the father's settlement, or that inquiries had been made as to his settlement, and that none had been found; neither of which has been done. But the respondents rely upon the birth settlement. If the father had a settlement in the same place they should have shewn it; but they rely upon the *prima facie* case of the birth. That is good till a settlement by parentage be shewn. Here that is shewn by proof of the mother's settlement. It is argued that the mother's settlement cannot be taken to be that of the child till the fact of the father's settlement is disproved; but that is not so here, because the mother's is good as against a settlement." *Rex v. St. Matthew, Bethnal Green* (g), there cited, may be relied on by the appellants, on account of

(a) Cald. 336.

(b) Cald. 371.

(c) 13 East, 311.

(d) Bott, 106.

(e) The preceding case.

(f) 3 A. & E. 644; S. C. 6 N. & M. 215.

(g) Bur. S. C. 484.

the dictum of *Wilmot J.*, "That the child's settlement follows that of its father, if the father's can be found; and that no *recourse* shall be had to the mother's settlement till that of the father can be traced no further." The above dictum, however, is no authority for the appellants, for it clearly applies to the priority of settlements *inter se when ascertained*.

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J. Hildyard *contra*. An order of removal cannot be made except to the *last* legal settlement of a pauper, and it must always adjudicate upon such settlement. *Rex v. St. Mary, Beverley (a)*, is a distinct authority for the appellants; the husband in that case might have been born in an extra-parochial part of Ipswich, and yet it was held that evidence of his having been born somewhere in that city was sufficient to supersede the maiden settlement of the wife. In *Reg. v. Leeds (b)*, the examinations stated that diligent search had been made for the husband's place of settlement; here it does not appear that any inquiry has been made whatever.

Lord DENMAN C. J.—I think that *Rex v. Harberton (c)* ought to govern this case, for there the Court said that evidence of the wife's settlement was *prima facie* sufficient, and that it lay upon the appellants to rebut it, by giving evidence of the husband's settlement in a different parish. In *Reg. v. Leeds (b)* it appears to have been taken for granted that some inquiry into the place of the husband's settlement was necessary, and the sessions merely put to us the question whether there had been sufficient inquiry, and this Court in effect did merely what amounts to saying, "as you put the question, we will answer it; the inquiry was sufficient." In *Rex v. St. Mary, Leicester (d)*, the mother's maiden settlement prevailed against the birth settlement. In *Rex v. St. Mary, Beverley (a)*, there was proof

(a) 1 B. & Ad. 201.

(c) 13 East, 311.

(b) The preceding case.

(d) 8 A. & E. 644; S. C. 5 N. & M. 215.

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of the husband's settlement, which rebutted the *prima facie* case of maiden settlement. *Rex v. Harberton* (a) does not support the doctrine that a removing parish is bound to inquire into and negative the husband's settlement before recourse can be had to the wife's. It is of course always *desirable* that a parish, before it removes to one settlement, should inquire whether there is not some settlement of a higher nature, for otherwise, if their order is appealed against, they may fail. But in this case there is no evidence at all of the husband's settlement. The propriety of inquiry must always be considered with reference to its value and the chance of obtaining information. The mere circumstance of an old man saying he believes he was born in London, does not raise any case for inquiry whatever.

PATTESON J.—This case is not distinguishable from *Rex v. Harberton* (a). There it was distinctly laid down that the removal to the wife's maiden settlement was *prima facie* sufficient, and that the onus was on the appellants to shew that the husband had a settlement. It is very true that, where it appears that the pauper's father has a settlement, it would be necessary to make some inquiry as to the place of it. *Rex v. St. Mary, Beverley* (b), was a case of that kind; and so in this case, if it had appeared that the pauper's father was born in some parish in London, the inquiry might have been followed out.

COLERIDGE J.—A mere hearsay statement, that the pauper's father was born in London, does not make it necessary to institute an inquiry as to the place of his birth throughout all the parishes of London.

Order of Sessions confirmed.

(a) 13 East, 311.

(b) 1 B. & Ad. 201.

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MARSHALL and another, Assignees of Toms, a Bankrupt,
v. LAMB (a).

ASSUMPSIT for money had and received to the use of the plaintiffs, as assignees, and on an account stated.

Pleas: 1. Non assumpsit.

2. That the plaintiffs were not assignees of the bankrupt.

Replication, joining issue on the above pleas.

The cause was tried before *Maule J.*, at the Liverpool Summer Assises, 1842. The action was brought to recover the sum of 717*l.*, paid on the 25th August, 1841, by the bankrupt to the defendant, under the following circumstances: By indenture of the 12th of June, 1840, to which the bankrupt, his wife, his sister, and the defendant were parties, reciting that on the marriage of the bankrupt the sum of 2000*l.* three per cent. Reduced Bank Annuities was settled upon trust to pay the dividends to his wife for her life, to her separate use, with power to her to appoint the same to her husband in case he should survive her, and, after the death of the bankrupt and his wife, upon certain trusts for the benefit of the issue of the marriage, with a general power of appointment in the wife in the event of a failure of issue; and reciting that the bankrupt's sister was possessed of a cottage for a term of years, and also that the bankrupt was possessed of a policy of insurance, effected on his own life, on the 1st of June, 1840, for the sum of 700*l.*, and that it had been agreed that the defendant should lend 700*l.* to the bankrupt on the security of the premises; the bankrupt's wife appointed and assigned the dividends on the said stock during the joint lives of herself

In order that a payment should constitute a fraudulent preference, it is not necessary that the bankrupt should have intended to benefit the creditor to whom the payment is made, or that the creditor should have derived benefit from such payment.

Therefore where a bankrupt, who together with his wife had joined in mortgaging for 700*l.* a sum of 2000*l.* in the three per cent. Reduced Annuities, settled to the separate use of the wife, with a power of appointing to the husband for life, and to their children in remainder, paid off the creditor:—*Held*, that this was a fraudulent

(a) Decided in Trin. Vac. last (June 29).

preference, although the object of the payment was to redeem the stock and benefit the bankrupt's own family.

A fiat in bankruptcy is sufficiently proved by proving it to have been signed by a Master in Chancery, without also proving his authority from the Chancellor to sign fiats, under stat. 1 & 2 *Will.* 4, c. 56, s. 12.

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and husband to the defendant, and also the capital sum of 2000*l.*, in the event of the general power of appointment arising by reason of the failure of issue, and the bankrupt also assigned his contingent interest in the dividends, as a security for the said loan. By the same deed the bankrupt also assigned his policy of insurance, and his sister assigned the above mentioned cottage as a security for the said sum of 700*l.* Proviso for re-assignment, on the bankrupt repaying the 700*l.* on the 12th December then next, and covenant by the bankrupt to pay on that day.

A fiat had been issued against the bankrupt on the 25th August, 1841, upon an act of bankruptcy committed on the 18th of the same month. On the same day on which the fiat issued, the bankrupt went to the defendant and repaid the defendant the loan of 700*l.*, with a further sum of 17*l.* for interest. The defendant was at first unwilling to receive the payment, on account of his not having any ready investment for the money. The above sum of 717*l.* was claimed back by the assignees, as having been paid to the defendant by way of fraudulent preference. It was contended for the defendant, that there was no fraudulent preference in the case, as the bankrupt did not intend to prefer or benefit the defendant by the payment, but to benefit himself and his family, by redeeming the trust fund. The learned judge was of opinion that the payment was a fraudulent preference. The fiat put in evidence was proved to have been signed by Master *Wingfield*. It was objected that this document was inadmissible, because it had not also been proved that the Master had authority from the Lord Chancellor to issue the fiat, under stat. 1 & 2 *Will.* 4, c. 56, s. 12, which provides that it shall be lawful for the Lord Chancellor, "and each of the Masters of the Court of Chancery, acting under any appointment by the Lord Chancellor, to be given for that purpose, &c., to issue his fiat under his hand." It was proved that Master *Wingfield* had frequently signed other fiats. The learned judge overruled the objection. Verdict for the plaintiff.

A rule nisi having been obtained in the following term for a new trial on the above objections,

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Martin and *Atherton* shewed cause (a). The proof that *Master Wingfield* had frequently signed fiats was sufficient evidence that he had been duly appointed for that purpose. Even on an indictment for perjury before a surrogate in the Ecclesiastical Court, the fact of the person who administered the oaths having acted as surrogate is sufficient evidence of his appointment and his authority to administer the oath: *Rex v. Verelst* (b). They referred also to stat. 2 & 3 Will. 4, c. 114, s. 9.

2. The payment was a fraudulent preference, although it was not intended to benefit the defendant. The validity of the payment depends upon the mind of the payer. In *Hall v. Taylor* (c), a bankrupt gave information through a third person to the defendant his creditor, which induced the creditor to issue execution, and it was held that the execution, though bonâ fide as far as the creditor was concerned, was notwithstanding invalid as a fraudulent preference. In *Turquand v. Vanderplank* (d), *Alderson B.* observed, that the case of a payment by way of fraudulent preference is left to be dealt with under stat. 6 Geo. 4, c. 16, s. 116, and that it is not affected by stat. 2 & 3 Vict. c. 29. Wherever therefore a payment is made voluntarily and in contemplation of bankruptcy, it is a fraudulent preference. The policy of the bankrupt law is, that the distribution of the estate of an insolvent trader should be entrusted to certain accredited functionaries, and it may be on this principle that the assignment of a trader's effects for the benefit of all his creditors is made an act of bankruptcy, though of course in such case there is no preference of any particular creditor. It may be said that the transaction was a mere redemption of a pledge; but the pledge,

(a) In Trin. Vac. last (June 26), before Lord Denman C.J., *Patteson* and *Williams* Js.

(b) 3 Camp. 432.

(c) 7 M. & W. 353.

(d) 10 M. & W. 180.

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it must be remembered, was not of the *bankrupt's* own property, so that the assignees have not the mortgaged property in lieu of the money paid. No point was made at the trial with respect to the bankrupt's interest in the trust fund and his life policy being also the subject-matter of the pledge.

Knowles and *Crompton* contra. It is not disputed that the fiat was proved to have been signed by a Master in Chancery, and *Rex v. Verelst* (a) is an authority merely to shew that the acting as such Master is evidence of being so. But this is not the case of a public officer, acting in his well known and ordinary character, but acting under a special and occasional authority. There is no such public officer as a Master acting as Lord Chancellor.

2. If this was a fraudulent preference, no mortgagee or pawnee, however bonâ fide his conduct, will ever be safe in accepting repayment of a loan. The defendant was obliged, on tender of the money, to give up the deeds, and, if he had refused, the Court of Chancery would have compelled him to do so. To constitute a fraudulent preference, there must be an intention to benefit the particular creditor, and this is assumed in *Harman v. Fishar* (b). In this case the defendant got no benefit from the payment, for he gave up his lien upon property which afforded ample security for the loan. The very case of a creditor having a lien on the title deeds of a bankrupt, which he refuses to deliver up except on payment of his debt, is put, in *Mavor v. Croome* (c), as a case in which the payment has always been esteemed valid as against any claim on the part of the assignees. In *Thompson v. Beatson* (d), defendants, who had a lien on C.'s ship, received from C., then lying in prison, the balance due to them on account of disbursements made on the ship, and they then delivered the ship's papers to C. C. became a bankrupt a fortnight after this

(a) 3 Camp. 432.

(b) Cowp. 117.

(c) 1 Bing. 363.

(d) 1 Bing. 145.

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payment. The Court held the payment good, and said that the assignees could not divest the defendants of the money, which they might have secured to themselves by retaining the ship in their possession. *Belcher v. Jones* (a) and *Abbott v. Pomfret* (b), shew that the fraudulent preference must move directly by way of benefit to the creditor preferred. In the former case, the partner of a banking firm about to stop payment gave information of the fact, in order that his father-in-law might draw his balance out of the bank, but desired that information might not be given to a Mr. *Davies*, who was a shareholder in the Phoenix Insurance Company, which also banked with the firm. The information, however, did reach two directors of the Phoenix Company, and the company's balance was drawn out in consequence. It was held that there was no fraudulent preference of the insurance company, as it was not the intention that the information given should be of use to that company. So in *Abbott v. Pomfret* (b), *Tindal C. J.* observed in his judgment, "This is the first time we have heard of a fraudulent preference of one, accompanied by payment to another. A fraudulent preference in general proceeds from motives arising from consanguinity or friendship, or other reasons inducing a payment to a particular creditor, in derogation of the rights of the general body of claimants. But it is contended here that, if the preference be for *A.*, and the money finds its way to the hands of *B.*, the assignees may sue *B.* That would be carrying the doctrine of fraudulent preference to an alarming extent." So here, the preference being to the bankrupt's wife and family, it is contended that the assignees may sue the defendant, to whom the bankrupt intended no preference.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court as follows :—The plaintiffs were assignees of a bank-

(a) 2 M. & W. 258.

(b) 1 Bing. N. C. 462.

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rupt, who had, borrowed 700*l.* from defendant, on a mortgage of his wife's estate, and also his sister's, and a policy of insurance belonging to the bankrupt, and covenanted to repay the money with interest at a day long past. When he was in desperate circumstances, and in contemplation of bankruptcy, and after he had committed an act of bankruptcy, he took the money to defendant, who at first declined to receive it, but, on being paid the then accruing half year's interest, accepted the money, and gave the bankrupt the title deeds and the policy. The assignees sought to recover this money, as paid after an act of bankruptcy, and not protected by the statutes 6 *Geo.* 4, c. 16, s. 82, and 2 & 3 *Vict.* c. 29, s. 1, because it was a payment by way of fraudulent preference; the learned judge thought them entitled to a verdict; and the propriety of his decision has been argued before us.

Plaintiffs' counsel contended that all which is required to constitute a fraudulent preference is found in these circumstances:—the undisputed contemplation of approaching bankruptcy, the subtraction of his money from the fund to be distributed among his creditors, the voluntary selection of one of these creditors, without pressure or application on his part. And though the object was admitted to be a direct benefit to bankrupt, his wife and sister, and the creditor was in nowise benefited, as he gave up the deeds on receiving the money, yet he was the party *preferred* at the expense of the estate, and the ulterior object can make no difference in the application of the law.

On the other hand, the language of the exceptions in the Bankrupt Acts was said to confine their operation to cases where a personal benefit to the preferred creditor is intended. Reliance was placed on some expressions of Lord Abinger C. B., and the Court of Exchequer, in *Turquand v. Vanderplank* (a).

We cannot relieve ourselves from a sense of the great difficulty that surrounds this question, but upon considera-

(a) 10 M. & W. 180.

tion, we adhere to the opinion expressed by the learned judge on the trial. If the property in mortgage had belonged to the bankrupt, the payment by him would not have been a fraudulent preference, because the assignees would have had the mortgaged property, and it is indifferent to them whether they have the property free from the mortgage (supposing it to exceed in value the amount of the mortgage), or the property subject to the mortgage and the amount of the mortgage money in cash; but here the property, except the policy, belonged to others. Yet the defendant was a creditor of the bankrupt, because the money was lent to him, and he covenanted to repay it, the payment therefore was emphatically a payment of the bankrupt's debt, in order to release the property of his friends, which they had mortgaged for his benefit; the defendant therefore did receive twenty shillings in the pound out of the bankrupt's estate, to the prejudice of other creditors, although it was no benefit to him, for he would have been as well off if he had kept the mortgage deeds.

Suppose the bankrupt had borrowed money from the defendant on the joint and several note of himself and a perfectly sufficient and solvent surety, and had voluntarily and in contemplation of bankruptcy paid off the note in order to relieve the surety, the defendant (the lender) would derive no benefit, for the solvent surety would be as good to him as money, yet would not this be a fraudulent preference? In that as in the present case, it seems to us that the creditor (quoad the bankrupt's estate) is preferred; he receives out of that estate twenty shillings in the pound, whereas the other creditors do not, and he is preferred fraudulently quoad the bankrupt's intention. And though the motive for giving that preference was ultimate advantage to himself and his own family, and not to the creditor, we think the preference fraudulent and the payment void.

There was another objection, which I rather think we disposed of in the course of the argument, namely, that the Master who signed the fiat was not shewn to have the Lord

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Chancellor's authority to sign fiats. We think the case on this point is quite within the rule, that a person acting as a public officer must be taken to have been authorised so to act.

Rule discharged.

Friday,
 Nov. 3.

EVERARD and another v. POPPLETON and another.

A warrant of attorney attested as follows: "signed, sealed, and delivered by the above-named A. B. in the presence of me, the attorney expressly named by him, and acting at his request, and by whom the above-written warrant of attorney was read over, and the nature and effect thereof explained to the said A. B. before the execution thereof by him," and subscribed merely with the name of the attorney, *Held*, not sufficient, with reference to stat 1 & 2 Vict. c. 110, s. 9.

T. F. ELLIS moved for a rule to shew cause why an order of *Wightman J.*, setting aside a warrant of attorney, judgment thereon, and all subsequent proceedings, on the ground of the attestations to the said warrant of attorney not being in compliance with stat. 1 & 2 Vict. c. 110, s. 9, should not be rescinded.

The attestations in question were as follows, "Signed, sealed and delivered by the above-named *George Charles Poppleton*, in the presence of us, of whom the said *John Hope Shaw* is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to the said *George Charles Poppleton*, before the execution thereof by him." Then followed the name and description of Mr. *Shaw*, and the name of another attesting witness.

The attestation by another attorney to the execution of the other defendant was in the same form.

The 9th section of the statute enacts, that "no warrant of attorney to confess judgment in any personal action, or cognovit actionem, given by any person, shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and

thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." In this case the attestation shews that the defendant had the full protection which the statute intended him to have; although it is not stated that the attorney subscribed as attorney, it is stated that he was "expressly named by the defendant, and acting at his request." In *Elkington v. Holland*(a), where the attestation was not near so full as in this case, *Parke B.* doubted whether it was not sufficient, observing, that "the act of parliament does not state the precise terms that are to be used, but merely the substance." In *Poole v. Hobbs*(b), *Coleridge J.* held an attestation bad which described the attorney of defendant as "named by him and attending at his request." But there the attestation did not state that the attorney was "acting" for the defendant, and *Coleridge J.* seems subsequently, in *Knight v. Hasty*(c), to have qualified his opinions on this subject. In *Hibbert v. Barton*(d), the attestation, which was held bad, viz. "witnessed by me, *W. P.* as the attorney of the said *A. B.*, attending at the execution hereof at his request, and expressly named by him," fell short of the attestation in this case, for there it was "witnessed as attorney," and not "acting as attorney."

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LORD DENMAN C. J.—I think we should follow *Poole v. Hobbs*(c). The question whether words equivalent to those in the statute may be used, does not seem to arise here, for the word "acting," in this case does not seem to carry it further than the word "attending" in *Poole v. Hobbs*(c).

WILLIAMS J. concurred.

COLERIDGE J.—I do not upon consideration think

(a) 9 M. & W. 659.

(b) 8 Dowl. P. C. 113.

(c) 12 Law J., Q. B. (N. S.) 293.

(d) 10 M. & W. 678.

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Poole v. Hobbs(a) wrong, nor did I mean to recede from it in *Knight v. Hasty*(b).

WIGHTMAN J. concurred.

Rule refused.

(a) 8 Dowl. P.C. 813.

(b) 12 Law J., Q. B. (N. S.) 493.

Wednesday,
November 8th.

The QUEEN v. The Inhabitants of the Township of
ADDERBURY EAST.

Upon an indictment charging a township with a prescriptive liability to repair a bridge, the declarations of an inhabitant are admissible against the township, for he is a party to the record, whether rated or not, and cannot be compelled to attend as a witness.

An indictment stated that from time whereof, &c. there hath been and still is an ancient

INDICTMENT for non-repair of a bridge. The first count stated, that on the 22d of December, 1841, there was, and from time to time whereof the memory of man is not to the contrary there hath been, and continually hitherto there hath been, and still is, a certain common and public bridge over the river Cherwell, commonly called "Nell Bridge," lying and being in a certain common highway, &c. for all the liege subjects, &c. on foot, and with their coaches, horses, carts and carriages, upon and over the said bridge to go, return, pass and repass, ride and labour, at their free will and pleasure; and that one part of the said bridge lies and is situate in the township of Adderbury East, in the county of Oxford, and the other part of the said bridge lies and is situate in the parish of Aynho, in the county of Northampton, and that the said part of the said bridge which lies and is situate in the township of Adderbury East, in the parish of Adderbury aforesaid, in the


bridge, that one part of it was in township *A.* and the other in parish *B.*; that the part in *A.* was out of repair, and that *A.* was under a prescriptive liability to repair.

It appeared that the bridge consisted of four arches, part of the principal arch and the whole of the other arches being in *A.*, and that in 1806 the principal arch had been widened from 9 to 16 feet at the joint expense of *A.* and *B.*

Held, that there was no misdescription of the township's liability, as if the prescriptive liability to repair the ancient bridge was well described, it was no answer to shew that there was something else, which defendants were not bound to repair.

And *quere*, whether the widening of the bridge was any thing more than a mode of repair, so that the bridge was still the same bridge, and the prescriptive liability extended over the added part as well as the old.

county of Oxford aforesaid, on the 22d of December, 1841, and continually from thence until, &c. was and yet is broken, &c. for want of needful repair. That the inhabitants of the township of Adderbury East aforesaid, from time whereof, &c. have repaired and amended, and have been used and accustomed to repair and amend, and of right ought to have repaired and amended, and still of right ought to repair and amend the said part of the said bridge which lies and is situate in the said township of Adderbury East, in the parish of Adderbury aforesaid, in the county of Oxford aforesaid, when and so often as it hath been or shall be necessary, &c.

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Second count, describing the bridge as a horse bridge.

Third count, describing the bridge as a foot bridge.

Plea: not guilty.

At the trial before *Parke B.*, at the Summer Assizes for the county of Warwick, 1842, it appeared that the bridge, called Nell Bridge, crossed the river Cherwell; that a part of the principal arch of the bridge, and under which the main stream of the river passed, was situate in the county of Northampton, and that the other part of the same arch, and all the rest of the bridge, viz. three other small arches, was situate in the township of Adderbury East, in the county of Oxford; that the Oxfordshire part of the bridge, on the day laid in the indictment, was out of repair, and that the township of Adderbury East had its own officers, distinct from any other hamlet or township, or from the parish of Adderbury. It further appeared, that about the year 1805 or 1806, the principal arch of the bridge, both in Oxfordshire and Northamptonshire, had been widened from nine to fifteen feet, and that part of the expense of widening it had been paid by the township of Adderbury East, and the rest by the parish of Aynho.

On behalf of the prosecution, evidence was received of declarations made by two persons, the one a churchwarden, the other a surveyor of the highways, of Adderbury East. It was not shewn that they were rated to any rates of the

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township, and the evidence was objected to on this ground. It was also objected that the indictment charging a prescriptive liability in the inhabitants of the township to repair a certain common and public bridge, which had existed from time immemorial, was not supported by the evidence, inasmuch as a portion of the bridge, mentioned in the indictment, namely, six feet in width, had been recently made, and that for the repair of this new portion of the bridge the defendants were not liable.

The learned judge declined to stop the case upon this objection to the indictment, but gave the defendants leave to move to enter a verdict. The defendants were found guilty.

Hayes, in the following Michaelmas Term, obtained a rule nisi accordingly, or for a new trial, on the ground that the declarations were improperly admitted in evidence.

Sir *W. W. Follett* S. G., *Adams* Serjt. and *Humfrey* now shewed cause. 1. The declarations by the officers of the township were admissible. They were inhabitant householders and parties to the record. Undoubtedly by statute they were *competent* witnesses (*a*), but, as they could not be *compelled* to give evidence, their declarations were admissible. On this point they referred to *Rex v. Woburn* (*b*), *Rex v. Hardwick* (*c*), *Worrall v. Jones* (*d*), *Mayor of London v. Long* (*e*). [*Patteson* J. referred to *Marsden v. Stansfield* (*f*).]

2. There was no misdescription of the part of the bridge which the defendants were liable to repair. *Rex v. Devon* (*g*) decided that the inhabitants of a county are not liable to widen a bridge, and *Rex v. West Riding of Yorkshire* (*h*), that a plea alleging the liability of a township to repair a

(*a*) See stat. 1 Ann. st. 1, c. 18,
s. 13.

(*b*) 10 East, 395.

(*c*) 11 East, 578.

(*d*) 7 Bing. 395.

(*e*) 1 Campb. 22.


(*f*) 7 B. & C. 815; S. C. 1 M.
& R. 669.

(*g*) 4 B. & C. 670; S. C. 7 D.
& R. 147.

(*h*) 2 East, 353, n.


carriage bridge, is not supported by evidence that the township had enlarged to a *carriage* bridge a bridge which they had before been bound to repair as a foot bridge. But even if a bridge be widened, the township would be still liable to repair the old part; and in the case secondly above cited it was expressly stated by *Buller J.*, that the township continued liable to repair the bridge as a foot bridge. The prosecutor goes for the non-repair of the ancient bridge, it is immaterial that there is another bridge which is not ancient. The form of the indictment will throw no hardship on the defendants, by fixing on them a liability which does not attach on them, for they may shew on any subsequent indictment that the added part of the bridge was not ancient. It may indeed be doubted whether the widened bridge is not still the *same* bridge which the defendants have been immemorially bound to repair. In another case of *Rex v. Devon (a)*, it appeared that there had been a county bridge, which was of wood, resting on stone abutments. The wooden part of the bridge was during a flood carried some distance down the stream. Part of the wooden materials were afterwards, together with new materials, formed into the upper part of the bridge, which was wider than it had been before the flood. It was held that the bridge was substantially the same bridge, and that the county was bound to repair the whole.

Kelly and Hayes contra. The admissibility of declarations is an exception to the ordinary rules of evidence, and the onus is on the prosecutor to establish the admissibility. It should have been shewn not only that the persons, whose declarations were admitted, were householders (as it may be assumed they were, from the offices held by them), and that they were liable to be rated, but also that they were actually rated, *Rex v. Kindford (b)*, for otherwise they would not be liable for any part of the fine which might become

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(a) 5 B. & Ad. 383.

(b) 2 East, 559.


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payable on conviction. [*Patteson J.* It is not enough to shew that they might have been competent witnesses; it must be shewn that they might have been compelled to give evidence.] Statute 3 & 4 *Vict.* c. 26, s. 2, enacts, "that no churchwarden, overseer or other officer, in and for any parish, township or union, or any person rated or assessed, or liable to be rated or assessed as aforesaid (see sect. 1), shall be disabled or prevented from giving evidence on any trial, appeal or other proceeding, by reason only of his being a party to such trial, &c., or of his being liable to costs in respect thereof, when he shall be only a nominal party to such trial, &c., and shall be only liable to contribute to such costs in common with other the rate payers of such parish, township or union."

2. The liability of the defendants was not properly described in the indictment. The indictment charges that the defendants are under a prescriptive liability to repair the whole of that part of the bridge which lies in their township. The evidence shewed that part of the bridge in their township was newly made. The defendants would not be liable for the part newly made, but the county would be liable: *Rex v. West Riding of Yorkshire (a)*. *Rex v. Middlesex (b)* is also an authority to the same effect. There the trustees of a turnpike road had constructed a wooden foot bridge along the outside of, and fixed to, the parapet of a carriage bridge, which *A. B.* was bound to repair *ratione tenuræ*, and it was held that the foot bridge was not parcel of the carriage bridge, which he was bound to repair, and consequently that the county was liable to repair the foot bridge. [*Patteson J.* The widening in those cases altered the character of the bridge; was not the widening in this case rather by way of repair?] Where a foot way is added, it is merely a widening of the original carriage way; but perhaps the question can hardly arise, for the prosecutors charge a liability by *prescription*, which cannot exist

(a) 2 East, 353, n.

(b) 3 B. & Ad. 201.

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with respect to the new part of the bridge, even if some other kind of liability can be established with respect to it. It must be remembered also, that the present record would be conclusive hereafter to establish a prescriptive liability with respect to all that part of the bridge which is in Adderbury. It would therefore not be open to the defendants, on a future occasion, to explain that they were under a partial liability only. The bridge is an entire bridge to the eye, and is so described in the indictment.

Lord DENMAN C. J.—The statute of *Victoria*, which has been referred to, as making the parish officers competent witnesses, does not appear to render evidence of their declarations inadmissible. For these officers were parties to the record as inhabitants, without reference to their being rated or liable to be rated, and could not be *compelled* to give evidence against themselves.

With regard to the second point, I think there is no misdescription of the liability of the defendants. And I think the case of the defendants is as favourably put as it can be, when it is put that they may relieve themselves, on any future occasion, from the liability to repair the modern part of the bridge, by shewing that no such liability was established under the present indictment, for I think it is doubtful whether the widening of the arch was anything more than a repair. If the township is only liable for the old part, they may shew hereafter which is the new part and which the old. But the township is liable for part of an ancient bridge, such as is described in this indictment.

PATTESON J.—The question as to the admissibility of the declaration, does not depend upon the parish officers being either rated or rateable inhabitants, but upon their being parties to the record. I do not understand why they should not be parties to the record, even if not rated. Rated to what? In an indictment against inhabitants, every inhabitant is a party, whether rated or not, and a parish cannot

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relieve a party from his liability in a case of this sort, by not putting him upon the rate. Assuming the officers to be competent, they could not be compelled to be witnesses, and, even if they could be, I think their declarations would be receivable as being those of parties to the record.

As to the other point, I will assume that the township is not liable to repair the added part—though I think it is, for no case touches the present, the widening being merely a mode of repairing, but it is not necessary to decide that point—and the question is, whether the liability of the township has been misdescribed. The indictment states, that from time immemorial “there hath been and still is a certain common and public bridge;” the indictment does not profess to describe the whole bridge, such as it is in the present day. It is said that the township is not liable to repair the new part of the bridge because it is not part of the *ancient* bridge. If the new part is not part of the ancient bridge, the indictment does not include the new part. The defendants appear to contend that the “ancient bridge” *does* include the new part, for the purpose of setting up a variance, and that it does *not*, for the purpose of throwing off their liability. The ancient bridge remains as it was, and if the new part does not form part of it, then the new part is not described in the indictment.

WILLIAMS J.—The declarants were parties to the record as inhabitants, and a fine under this conviction might be levied on any inhabitant.

On the other point, I will merely say that it has not been contended that there is no bridge which fulfils the description in the indictment, but it is said, “true, there is such a bridge, but there is also something *more*.” Where an addition alters the character of a bridge the case is different; we are simply on the question whether that existed which is described in the indictment.

COLERIDGE J.—I am entirely of the same opinion.

The 2d section of the statute of *Victoria* clearly does not extend to this case, for it speaks of nominal parties, so that those who are substantially parties to a record cannot be affected by the provision.

The second question is, whether the indictment was proved. The material allegation was, that there was an ancient bridge, which the defendants were bound to repair. It appeared that there was an ancient bridge to which something had recently been done. Either the bridge is still the same bridge, and the liability of the defendants will follow accordingly, or the new part is to be severed from the ancient bridge, and then there is the ancient bridge and something else. I grant that the defendants, if they are not liable to repair the new part (though I very much doubt the exemption contended for), may have difficulty in shewing hereafter that their liability was not established by this record, but the law must not be strained to obviate such a difficulty. The simple question is, whether the liability was proved as charged, and I certainly think it was.

Rule discharged.

SHENTON v. JAMES.

Saturday,
Nov. 11th.

ASSUMPSIT by payee against maker of a promissory note.

The pleadings are immaterial.

At the trial before *Williams J.* at the last Staffordshire Summer Assizes, it appeared that the note was dated the 17th December, 1842, and was in the following form :

" On demand I promise to pay to *William Shenton* the sum of fifty pounds, in consideration of foregoing and forbearing an action at law in the Court of Queen's Bench,

amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway."

Held, that the money was payable absolutely, and the instrument a promissory note.

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" On demand I promise to pay to *S.* the sum of 50*l.*, in consideration of foregoing and forbearing an action at law in the Court of Queen's Bench, for damages ascertained by consent to

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for damages ascertained by consent to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway in the parish of Seighford."

It was objected that this instrument was not a promissory note, but an agreement, which should have been stamped accordingly. The learned judge overruled the objection, but gave the defendant leave to move to enter a nonsuit.

R. V. Richards on a former day in this term, (November 3,) moved accordingly, and contended that the instrument was not payable absolutely, and at all events; being payable in consideration of foregoing and forbearing, and not in consideration that the plaintiff had foregone and forborne; so that its payment was made contingent on a condition which might or might not be performed. He cited *Clarke v. Percival* (a), *Horne v. Redfearn* (b), *Chitty on Bills*, 9th ed. p. 136.

Cur. adv. vult.

LORD DENMAN, C. J. now delivered the judgment of the Court.—We are clearly of opinion that this is a promissory note made on an executed and completed consideration. The consideration was a past consideration, and the damages had been ascertained. *Clarke v. Percival* (a) was referred to, to shew that this is not an undertaking to pay at all events, but we think it is.

Rule refused.

(a) 2 B. & Ad. 660.

(b) 4 Bing. N. C. 433.



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HALL v. BAINBRIDGE and another.

Tuesday,
Nov 14th.

ASSUMPSIT. The declaration stated, that, before and at the time of making the promise thereafter mentioned, to wit, on the 22nd December, 1831, the plaintiff had invented an improved piston and valve for steam, gas, and other engines, and also an improved method of lubricating the piston rods and valves or cocks of such engines, and of condensing the steam, and supplying water to the boilers of such steam engines as are wrought by a vacuum produced by condensation, and that the plaintiff was the first and true inventor thereof, and the same, at the time of the making and granting of the letters-patent thereafter mentioned, had never been practised by any other person or persons whomsoever.

The declaration then stated, that on the day and year aforesaid, the plaintiff obtained a patent, in respect of the above invention, for the term of fourteen years.

The declaration then set out several other subsequent inventions and improvements in steam engines, and stated that he had also obtained patents for them respectively.

The declaration then proceeded to state, that before the promise of the defendants, a company of persons using the name and description of the British and American Steam Navigation Company, to wit, on the 26th of November, 1836, had contracted for the building of a new steam ship or vessel, and also contracted for the construction and fixing of a pair of steam engines on board said steam ship or vessel, and thereupon, to wit, on the 28th November, 1836, by a certain agreement then made between plaintiff

Assumpsit. The declaration stated that the plaintiff had obtained a patent for steam engines, that defendants were about to build a steam ship, that plaintiff on the 28th Nov. 1836, agreed to allow them to use his patent in the construction of a pair of steam engines then about to be made for the ship, and also to use his patent in engines for any other ships thereafter, the defendants to pay 2000*l.*, viz. 1000*l.* on the 1st August, 1837, and the remainder on the 1st July, 1838; and also 5*l.* per horse power, for every engine "which should at any time thereafter be made or manufactured and

used on board any other ship" of the defendants, in which the principles of the plaintiff's patent should be used or adopted, the same *to be paid for on the entering into a contract* with an engine maker for the manufacturing of such engine.

Held, that the 5*l.* per horse power was payable as soon as the defendants entered into a contract with the engine maker, and that it was payable, although the contract with the engine maker was afterwards rescinded, and no engine, on the plaintiff's principle, was either used or manufactured; for the consideration for the promise was the license to use and not the user.

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and defendants, plaintiff agreed with defendants that it should be lawful for said British and American Steam Navigation Company, whoever might be the persons for the time being constituting the same, thenceforth during the term for which said letters-patent or any of them were respectively granted, or during the period of any renewal or renewals of the same respectively, to make, construct, or manufacture or use, subject to certain qualifications and restrictions then agreed on by and between plaintiff and defendants, the said pair of steam engines about to be made on board and for the use of said steam ship or vessel so about to be built as aforesaid, upon the principle of the inventions secured by said letters-patent respectively, or any of them, with all or any of the improvements specified in said letters-patent, or any of them, and all apparatus necessary for the purposes; *and also* thenceforth during the terms for which said letters-patent were respectively granted, or any of them, and during the term of any renewal or renewals of the same respectively, to make, construct or manufacture and use, (subject to said qualifications and restrictions then agreed on between said plaintiff and defendants), on board of any other vessel or vessels thereafter to be purchased or built, by, for, or on account of said British and American Steam Navigation Company, any steam engine or steam engines upon the principles of the inventions aforesaid, or any of them, with all or any of the improvements aforesaid, and all apparatus necessary for those purposes. And, in consideration of the premises, defendants then did agree with plaintiff in manner following, that they the defendants should and would pay to plaintiff the sum of 2000*l.* by instalments, and in the manner following, that is to say, the sum of 1000*l.* on the 1st August, 1837, and the remaining sum of 1000*l.* in cash on the 1st July, 1838; *and also* that the defendants would pay unto the plaintiff at and after the rate of 5*l.* per horse power for each *and every engine which should at any time or times thereafter be made, constructed or manufactured and used on*

board any other ship or vessel, ships or vessels, thereafter to be purchased or built by, or for, or on account of the said British and American Steam Navigation Company, during the continuance of said several letters-patent, or any of them, or during the continuance or renewal or renewals of the same, in which the principles of the inventions secured by said letters-patent respectively, or any of them, or all or any of the improvements specified in said letters-patent, or any of them, should be *used or adopted* by said company, *the same to be paid for on the signing of or entering into the contract or contracts for the manufacturing or purchasing of such engine or engines* respectively, either in cash or in bills, at the option of defendants; but in case the same should be made in bills, then the same should bear interest at the rate of 5*l.* per cent. per annum, to commence and be calculated from the expiration of nine months from the date of such contract or contracts. Provided always, and it was then agreed by and between the plaintiff and defendants, that in case any vessel or vessels, at any time belonging to said company, on board of which any engine or engines should be used, in which all or any of the principles of the inventions and improvements as aforesaid should have been adopted or used, should be lost at sea or destroyed, or the engines or vessels should be worn out, or the use of such inventions and improvements therein should be abandoned from any cause whatsoever, said company should be at liberty to substitute any other vessel or vessels, or engine or engines, of any equal or greater or less power, in lieu thereof respectively, without paying any consideration for the same, unless same should exceed in power the engine or engines which should be so lost, destroyed or abandoned therein as aforesaid, and in case the same should so exceed, then on payment only for such excess at the rate and after the manner therein aforesaid. Provided always, and it was then further agreed by and between the plaintiff and defendants, that the arrangements of the needful apparatus, and the manner in which it should

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be constructed and applied on board said vessel, should be subject to the approbation of the plaintiff, or other the owner for the time being of said letters-patent, who should be at liberty to employ a servant or agent to superintend such arrangement and application at the expence of plaintiff, and that no application of said patent apparatus, or any part thereof, or any alterations therein, should be made, but what should be first approved of by the plaintiff, or the owner for the time being of said patent rights, or any renewal or renewals of same respectively, or his or their servants or agents. But it was thereby declared and agreed by and between plaintiff and defendants, and plaintiff did then undertake and agree, that on receiving notice, from or on behalf of said company, of their intention to adopt said patent apparatus, or any part thereof, or to make any alteration therein, or in the application thereof in any engine or engines of or for said company, he the plaintiff or other the owner for the time being should forthwith either by himself or his servants or agents, superintend such arrangements, applications or alterations, and approve of same, and, in default of his or their so doing, it should be lawful for said company, with such approbation as therein aforesaid, to make such arrangements, applications or alterations as therein aforesaid. And plaintiff therein further agreed with defendants to furnish at his own expence to said company all necessary drawings, and also to make and furnish any part of said apparatus as might be required by their engineers, Messrs. *Claud, Girdwood & Co.*, but to be paid for by them the said Messrs. *Claud, Girdwood & Co.*, and plaintiff did therein further agree, that he would at his own expence within thirty days after being required to do so by the secretary of said company for the time being, use his utmost endeavours by suit or otherwise to protect and prosecute any person or persons using or infringing upon said patent rights, or any of them, unless such person or persons should have previously agreed with the plaintiff for the use of the same.

Averment of mutual promises, and that the several patents were still in force, and that plaintiff had performed all things on his part to be performed ; that after the making of said agreement, and during said term for which said letters-patent were respectively granted, and before the commencement of this suit, to wit, on the 29th May, 1838, a certain contract in writing was made and entered into by and between said company so using the name, style and description aforesaid, and Messrs. *Fawcett, Preston & Co.*, for the manufacturing by the latter of two engines of 550 horse power, for the purpose of propelling and being used on board of a certain vessel, to wit, a vessel called "The President," before then and after the making of said agreement built by and for and on account of said company, and during the continuance of said letters-patent, and in which engines the principles of the inventions secured by said several letters-patent were to be used and adopted by said company; and thereupon, that is to say, on the entering into said contract, defendants became and were liable to pay to plaintiff, either in cash or in bills as aforesaid agreed on, a large sum of money, to wit, 2750*l.*, being a sum at and after the rate of 5*l.* for each horse power of said two engines of 550 horse-power so contracted for as aforesaid.

Breach, the non-payment in cash or in bills, or otherwise, of the sum of 2750*l.*, &c.

Third plea. That after the making of the contract for manufacturing the engines in the declaration mentioned, and within nine months from the date thereof, and long before the commencement of this suit, and before any one of the principles of the invention secured by the letters-patent, or any part thereof, and before any one of the improvements specified in the letters-patent, or any part thereof, had been used or adopted by the company, or by Messrs. *Fawcett & Co.*, in the manufacturing by them of the two engines in the declaration mentioned, or either of them, it was, to wit, on the 30th May, 1838, mutually

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agreed by and between said company and Messrs. *Fawcett & Co.*, that so much of the contract for manufacturing the engines as related to the using and adopting therein the principles of said inventions secured by the letters-patent should be, and the same then was, wholly rescinded and abandoned, and that Messrs. *Fawcett* aforesaid should manufacture the engines for the company without using or adopting therein the principles of the inventions secured by the letters-patent, or any part thereof, or the improvements specified in the letters-patent, or any part thereof : that Messrs. *Fawcett* manufactured the engines for the company, and that there never was at any time used or adopted in the engines, or in the manufacturing thereof, any whatsoever of the principles of the inventions secured by the letters-patent, or any part whatsoever thereof, nor any of the improvements specified in the letters-patent, or any part whatsoever thereof, but that on the contrary the engines were made and manufactured upon a principle different and distinct from the principles of the invention and improvements secured by and specified in the letters-patent or any of them.

That defendants, to wit, on 1st January, 1837, paid to plaintiff said sum of 2000*l.* in the agreement mentioned, and that neither plaintiff, nor any other owner for the time being of the letters-patent, or any of them, ever employed any servant or agent whatsoever to superintend the manufacturing of said engines or any part thereof, or the application therein or thereto of the patent apparatus or any part thereof, or otherwise howsoever; nor did plaintiff or any such owner as aforesaid make or furnish, nor was he or they required to make or furnish, to the company, or to any other person or persons whatsoever, any drawing or drawings whatsoever, or any apparatus whatsoever for or in respect of the engines or the manufacture thereof; nor did the plaintiff, or any other person or persons whatsoever, ever incur any labour or trouble or expense whatsoever in respect of said engines, or in respect of using or adopting,

or the proposal to use and adopt the principles or improvements in the engines or either of them, or in the manufacture thereof; nor was he the plaintiff ever required by the secretary of the company or said company, or any member thereof, to use any endeavours to protect the patent or to prosecute any person using or infringing the same. Verification, &c.

General demurrer and joinder.

The plaintiff's points for argument were—

1. That the use or adoption of the principle secured by the letters-patent in the manufacturing of the engines was not a condition precedent to the plaintiff's right to be paid the stipulated remuneration.

2. That the plaintiff's right to the stipulated remuneration having once attached, could not be destroyed by any agreement entered into between the defendants and other persons to which the plaintiff was no party.

3. That the plea applied to a part only of the consideration stated in the declaration.

4. That although by the plea it is attempted to be shewn that the completion of the contract with Messrs. *Fawcett & Co.* was a condition precedent to the plaintiff's right of action, yet the plea discloses that the completion of the said contract was prevented by the defendants' own acts, without the knowledge or consent of the plaintiff; and it does not appear either in the plea or in the declaration that defendants had power or authority to rescind the contract entered into with Messrs. *Fawcett & Co.*

The points for the defendants were, that, according to the true construction of the agreement, the defendants were not liable to pay to the plaintiff 5*l.* per horse power for engines, in which, although originally intended to have had the principles of the invention secured by the letters-patent used or adopted therein, nevertheless, in point of fact, such principles never were used, the original intention having been abandoned; and that, supposing the payment to have been made on the signing or entering into the con-

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tract, upon the abandonment of the intention to erect the engines according to the principles of the patent, before any of the principles had been used or adopted therein, the money so paid would be recoverable back; and, if so, then, upon the legal principle of avoiding circuity of action, the action is not maintainable.

Cowling, in support of the demurrer, to shew that the user of the plaintiff's patent was not a condition precedent to the payment of the money, as the time of signing the contract with the engine manufacturer was fixed as the time of payment, referred to note (4) to *Fordage v. Cole* (1 *Wms. Saund.* 320 a, 5th ed.) and to *Wilks v. Smith* (a). The words "used and adopted" in the agreement must be construed as "intended to be used and adopted."

Martin contra. Although a time is fixed for payment, yet if it had been paid at the stipulated time it might be recovered back, as the consideration has entirely failed. It would lead, therefore, to circuity of action, if the plaintiff, under these circumstances, can enforce payment. By the agreement 2000*l.* is to be paid for the use of the first ship, and also 5*l.* per horse power "for each and every engine which should at any time or times thereafter be made, constructed or manufactured and used on board any other ship." The words "used and adopted" therefore in the subsequent part of the agreement are not used inaccurately, but in conformity with the whole scope of the agreement. When the money is to be paid is immaterial, the question is, what is it to be paid for, and, if paid, could it not be recovered back, and, if it could be so recovered back, can payment be enforced, which would merely lead to circuity of action? Where freight was made payable by the shipper on the shipment of the goods, it was held nevertheless that it was not merely on that account earned without performance of the voyage: *Mashiter v. Buller* (b). For the doc-

(a) 10 M. & W. 355.

(b) 1 Campb. 84.

trine as to avoidance of circuity of action he referred to note (2) to *Turner v. Davies*, 2 *Wms. Saund.* 150 (5th ed.), and *Carr v. Stephens* (a).

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Cowling in reply. The money, if paid, could not be recovered back. If it could, at what time would the right accrue to recover it back? How long could the plaintiff retain the money? A reasonable time. What could be said to be a reasonable time? The licence to use is the consideration for the payment. Even on the view taken by defendants, the consideration would not entirely fail where there was no user, for it may be that more than 2000*l.* would have been charged for the original licence, if the plaintiff had not reckoned on the application of his invention by the defendants in other vessels, so that the 5*l.* per horse power may be in part the payment for the original licence. (He was then stopped.)

LORD DENMAN C. J.—The quantity of horse power in the engines to be manufactured is the measure of the payment to be made. But it cannot be said that any actual user of the patent was necessary to the plaintiff's right to recover, or any further consideration necessary than his licence for the user. The defendants have bound themselves to pay a certain price for the licence whensoever they enter into a contract for the building of engines on the plaintiff's principle, and they cannot depart from that contract merely by changing their own minds.

WILLIAMS J.—The 2000*l.* in gross was to be paid for the mere licence to use the plaintiff's invention in the first vessel. The plaintiff would have been entitled to the 2000*l.* whether his principle was used or not in that vessel. The payment of the 5*l.* per horse power is payable for the licence in the same way and not for the user.

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COLERIDGE J.—It is true the agreement states the 5*l.* per horse power is to be paid for every engine which should be thereafter manufactured. But then the agreement goes on to say that the 5*l.* is to be paid on the signing any contract for the manufacturing of such engine. This stipulation furnishes, I think, the true construction, viz. that the agreement between the plaintiff and defendants was to be considered complete so soon as they entered into a contract with the engine manufacturer, and that time might be fixed upon reasonably enough, because the contract would specify the amount of horse power for which the defendants required the plaintiff's licence.

WIGHTMAN J.—I am of the same opinion. The test is whether, supposing the 5*l.* per horse power to have been paid, the defendants could have recovered it back on rescinding their contract with the engine maker. I think the defendants could not recover the money back under such circumstances. The plaintiff might be put to great difficulty if he was bound to find out when any engine was finished. To obviate such a difficulty, the time of payment is fixed to be the time when the defendants by entering into a contract with the engine maker declare their intention to use the plaintiff's invention. The contract entered into with the engine maker is to be taken as a declaration to the plaintiff "we will use your patent, we want your licence for so much horse power, and here is the money." After such a declaration the defendants are not at liberty to say they have changed their minds, and will be off their bargain with the plaintiff. Suppose the engine maker refused to rescind the contract and completed the manufacture of the engine contracted for, would it have been any answer to this action for the defendants to say, "true, the engine was manufactured according to your patent, but we have never used the engine, and don't mean to use it."

Judgment for the plaintiff.

1849.

CLIPSHAM v. VERTUE and another.

*Tuesday,
November 14.*

ASSUMPSIT on a charter-party. The declaration stated that theretofore, to wit, on the 28th of May, 1842, it was agreed between the plaintiff, owner of the ship *Emblem*, and the defendants, that the said ship should load from the agents of the defendants at Nantes a full cargo of wheat and flour, or other grain or seed, and, being so loaded, should forthwith proceed to London, or so near thereunto as she might safely get, and deliver the same, on being paid freight, &c.; that the vessel afterwards, to wit, on the 16th of June, 1842, did proceed to Nantes, and arrived there, to wit, on the 26th of July, 1842, whereof the agents of the defendants had notice, &c.; and, being so arrived at Nantes, the ship afterwards, to wit, on the 6th of August, 1842, was ready to load her cargo within the true intent and meaning of the charter-party in that behalf, of all which the agents had notice. The declaration then charged the refusal of the defendants to put the required cargo on board.


A declaration on a charter-party stated that it was agreed, between the plaintiff and the defendants, that the plaintiff's ship should load from the agents of the defendants at Nantes a full cargo of wheat, and deliver the same at London on being paid freight; that the ship went to Nantes, and that defendants refused to load a cargo.

Third plea. That the charter-party in the declaration mentioned was made and entered into by the plaintiff and the defendants at London aforesaid, and that the vessel was at the time of the making of the charter-party lying in the port of London; that after the making of the charter-party, and before the vessel set sail or proceeded upon the voyage to Nantes aforesaid in pursuance of the charter-party, to wit, on the 29th day of May, in the year of our Lord, 1842, the plaintiff wrongfully, and without the knowledge or consent of the defendants, set sail with the vessel upon another and a different voyage from the voyage to Nantes aforesaid, to wit, upon a voyage from the port of

Plea, that the charter-party was entered into at London while the ship was at London, and that the plaintiff, without defendants' consent, sailed from London to Newcastle, and thence to other places than Nantes, by means of which the ship did not arrive at Nantes "within a reasonable and

proper time in that behalf," but "a long and unreasonable time, to wit, thirty-eight days, after she would have arrived at Nantes according to the usual length of the voyage, if she had sailed direct."

Held, on special demurrer, that the plea was bad, as it did not appear that defendant had, in consequence of the delay, lost the benefit of the voyage.

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London aforesaid to the port of Newcastle, &c., and proceeded with the vessel upon the said last mentioned voyage; and afterwards, to wit, on the 3d day of June, in the year of our Lord 1842, arrived at Newcastle aforesaid, and remained there with the vessel at Newcastle aforesaid for a long space of time, to wit, twenty-three days, for other and different purposes than the voyage in the charter-party mentioned, to wit, for the purpose of chartering and engaging the vessel to other persons than the defendants, upon a voyage from Newcastle aforesaid to other places than Nantes in parts beyond seas, and back to Newcastle aforesaid, which sailing and proceeding to and remaining at Newcastle aforesaid were contrary to the form and effect and true intent and meaning of the charter-party, and a breach thereof on the part of the plaintiff, by reason of which sailing and proceeding to and remaining at Newcastle aforesaid, the vessel was prevented from arriving at and did not arrive at Nantes aforesaid, as in the declaration mentioned, *within a reasonable and proper time in that behalf* after the making of the charter-party, but, on the contrary thereof, the vessel arrived at Nantes aforesaid a long and unreasonable time, to wit, thirty-eight days, after the vessel would have arrived at Nantes, according to the usual length of the voyage from London aforesaid to Nantes aforesaid, if the vessel had sailed direct from London aforesaid to Nantes aforesaid according to the true intent and meaning of the said charter-party; and this the defendants are ready to verify, &c.

Special demurrer, on the ground (among others) that the plea, though pleaded in confession and avoidance, did not set forth matters sufficient to discharge the defendants, as it did not shew that the defendants were by the delay rendered unable to ship a cargo according to the charter-party, or that the object of the voyage was lost.

Joinder in demurrer.

W. H. Watson in support of the demurrer. The plea is

no answer. The charter-party did not stipulate that the ship should commence its voyage to Nantes at any specified time. If the ship did not commence its voyage within a reasonable time, the defendant may have his action for damages, as in *M^cAndrew v. Adams* (a), but he cannot set up the delay as a ground for putting an end to the contract. The plea should have shewn that by reason of the delay the defendants had lost all benefit from his contract of affreightment, as in *Freeman v. Taylor* (b). In *Bornmann v. Tooke* (c), by a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, the plaintiff bound himself to sail with the first favourable wind direct to Portsmouth. The ship unnecessarily went to Copenhagen, and was detained there several weeks. It was held that the covenant to sail direct to Portsmouth was not a condition precedent, and that the deviation could not be given in evidence either as a bar to the action or to diminish the damages. So in *Fillieul v. Armstrong* (d), to an action brought against a schoolmaster for dismissing a French teacher, a plea that the plaintiff absented himself from the school for a long and unreasonable period, was held neither to shew that the contract was put an end to, nor that the defendant had a right to dissolve it. This plea neither shews that the object of the voyage was lost to the defendants, or that they have sustained any inconvenience from the delay.

Cleasby contra. In *Bornmann v. Tooke* the defendant had received benefit from the contract, for the cargo had been actually delivered at Portsmouth and accepted by the defendant; and the same remark applies to many other cases, such as *Ritchie v. Atkinson* (e) and *Havelock v. Geddes* (f).

(a) 1 Bing. N. C. 29.

(b) 8 Bing. 124.

(c) 1 Campb. 377.

(d) 7 A. & E. 557; S. C. 2 N. & P. 406.

(e) 10 East, 295.

(f) 10 East, 555.

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Here the defendant has had no benefit from the contract, and is entitled to put an end to it. In *Mount v. Larkins* (a), which was an action on a policy of insurance on a ship from Sincapore to Europe, the jury found that the ship did not commence the voyage from Sincapore in *reasonable* time, and it was held that the defendant was discharged. The present is a much stronger case, for surely time is more of the essence of the contract in a contract of affreightment than in one of insurance. Suppose the charter-party had expressed that the ship should commence its voyage to Nantes on a particular day, it would have been a good answer to this action to plead that it did not sail until afterwards, without shewing that the purpose of the voyage had been lost by the delay. Now it is *implied* in this charter-party that the ship should sail in reasonable time. The case is the same therefore as if there had been a particular day of sailing expressed. Where a ship was freighted to go to Jamaica and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th June, it was held, that by her non-arrival until after the 25th June, the freighter was entirely discharged from his contract to furnish a cargo; *Shadforth Higgin* (b). The words "*reasonable time*" are to be understood with reference to the objects of the voyage. The word "*arrival*," where no particular time was fixed, has been construed in like manner; *Soames v. Loneragan* (c).

Lord DENMAN C.J.—I think the plea bad. The defendant has done right to demur to it, for, if he had not, it might have been said that he had put some construction on the words "*within a reasonable and proper time in that behalf*," a thing which I confess myself unable to do. I think it possible, that though the ship did not arrive within a time which the defendants consider reasonable, yet it may

(a) 8 Bing. 108.

(b) 3 Campb. 385

(c) 2 B. & C. 564; S.C. 4 D. & R. 74.

have been in time for the purposes of the voyage. I think many of the observations of Lord *Ellenborough*, C. J. in *Havelock v. Geddes*, with respect to failure of consideration, may possibly be applicable here.

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WILLIAMS J.—The plea leaves the meaning of the words “reasonable time” entirely a matter of speculation in the mind of the defendants. The plea gives no intimation that the voyage was lost by the delay, or that the defendants have sustained any inconvenience.

COLERIDGE and WIGHTMAN Js. concurred.

Judgment for the plaintiff.

MUSGRAVE v. DRAKE and others.

Tuesday,
November 14.

ASSUMPSIT by indorsee against the acceptors of a bill of exchange, drawn by one *Myers*, and by him indorsed to the plaintiff.

Plea by four of the defendants, that they did not accept the bill and issue thereon.

Drake and the other remaining defendant had suffered judgment by default.

On the trial before *Wightman J.* at the last Yorkshire Assizes, it appeared that the defendants were partners in trade, and that the bill had been accepted by *Drake* in the name of the firm. The jury found that the bill was accepted in fraud of the partnership, and not for partnership purposes, and that the plaintiff had no knowledge of the fraud. Verdict for the plaintiff, with leave to move to enter the verdict for the defendants, if the Court should be of opinion that the circumstances under which the bill was accepted had cast upon the plaintiff the onus of proving that he had given consideration for the bill.

Atherton on a former day in this term (Nov. 6), moved

Where, under an issue on the plea of non acceptit, it appears that the acceptance is made in the name of a firm by a partner competent to bind the firm, then, although such acceptance is shewn to be a fraud on the firm, yet, if it is not shewn that the holder had knowledge of the fraud, he is not called upon to prove that he gave consideration.

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accordingly, and relied upon *Heath v. Sansom* (a). As to the question arising under the plea of non accepit he cited *Jones v. Corbett* (b).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court (c). We have consulted the judges of the other Courts, and they agree that where, under an issue on the plea of non accepit, it appears that the acceptance is made in the name of a firm, by a partner competent to bind the firm, then, although such acceptance is shewn to be a fraud on the firm, yet, if the holder is unaffected by knowledge of the fraud, he is not called upon to prove that he gave consideration.

Rule refused.

(a) 2 B. & Ad. 291.
 (b) 2 G. & D. 308.

(c) Lord Denman C. J., *Williams, Coleridge and Wightman Js.*



Tuesday,
 Nov. 14th.

DAWSON v. CHOLMELEY.

The horse of a guest at a common inn was stabled with another horse, and kicked and injured by it.

Held, that, though these facts raised a presumption of negligence against the innkeeper, he might defend himself by shewing that due care had been used, for that he was not liable without negligence.


CASE. The declaration stated that the defendant kept a common inn for the accommodation of travellers and cattle, and that the plaintiff became his guest and brought a certain horse to the said inn; that defendant received the horse on the occasion and for the purpose aforesaid, that is to say, that the horse should be stabled, fed and duly taken care of, yet that the defendant by himself and his servants so negligently conducted himself, &c. that by and through his neglect the plaintiff's horse was kicked and injured by another horse, &c.

Pleas, 1. Not guilty.

2. That defendant did not as such innkeeper receive the horse in the said inn, to be taken care of in manner and form, &c.

Issue on the above pleas.

The case was tried before *Cresswell J.* at the last Carlisle

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Assizes. It appeared that the defendant was an innkeeper at Penrith, and the plaintiff a farmer. On the day on which the injury was done, being a market-day, the plaintiff brought his horse to the inn and put up there. He delivered his horse to the defendant's ostler, who put it in a stable with another horse. The plaintiff's horse was afterwards found to have been kicked and most severely injured by the other horse. This was the plaintiff's case, which, in the opinion of the learned judge, raised such a presumption of negligence against the defendant as to call for an answer. The defendant then gave evidence to shew that both the horses in the stable had been secured and attended to in a proper manner. The learned judge directed the jury that the defendant was not liable, unless he had been guilty of positive negligence. Verdict for the defendant on the first issue and for the plaintiff on the second issue.

W. H. Watson, on a former day in this term, moved for a new trial on the ground of misdirection. Besides the authorities referred to in the judgment, he cited *Sanders v. Spencer* (a), and *Stunyon v. Davis* (b).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court (c) as follows:—This was a motion for new trial on the ground of misdirection; the learned judge having told the jury that the innkeeper was not answerable for injury done to the horse of a guest placed in his stable by the kick of another horse, unless there was some negligence proved in the innkeeper. The plaintiff's learned counsel urged that an innkeeper, like a carrier, was bound at all events to restore the guest's property in as good plight as it came into his custody, and was consequently responsible for any damage which it had received by any means while there.

(a) Dyer, 266 b.

(b) 6 Mod. 223.

(c) Lord Denman C.J., *Williams, Coleridge and Wightman, Js.*

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The law of England is clearly laid down in *Calye's case* (a), which is a full comment on the writ in *Fitzherbert's Natura Brevium*, 94 A. One ingredient is, that the loss or damage arises "pro defectu hospitatoris seu servientium suorum." When, therefore, the nature of the injury left the cause wholly doubtful, it was correct to take the opinion of the jury whether the evidence established that the injury was occasioned by a defect of such care.

Mr. Justice *Story's* convenient and excellent *Treatise on Bailments* was quoted as laying down a different rule. This does not appear to us to be so, if the whole passage be examined. That learned author, sect. 470, p. 306, adopts the common law responsibility of innkeepers from the *Registrum Brevium*, 105, in these terms:—"That, by the custom of the realm, innkeepers are bound to keep the goods and chattels of their guests which are within their inns, without subtraction or loss, by day or night, so that no damage shall come to them from the negligence of the innkeeper or his servants." And in section 472 (b) he lays it down, that "the loss of the goods while at an inn will be presumptive evidence of negligence on the part of the innkeeper or of his domestics."

Now in the present case, when the plaintiff had closed his evidence, the learned judge thought that there was a presumption of negligence, and called on defendant for his answer, which was given by proof of such attention and skilful management, as to convince the jury that the damage could not have been occasioned by the negligence imputed. That proof took away the ground of action according to all the authorities.

The doubt expressed by *Bayley J.* in *Richmond v. Smith* (c) applies to another branch of the doctrine.

Rule refused (d).

(a) 8 Rep. 32 a.

(b) The sect. commences "But innkeepers are not responsible to the same extent as common carriers."

(c) 8 B. & C. 9; S. C. 2 M. & R. 235.

(d) The name of the defendant in this case should have been printed *Chamney*.

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Wednesday,
Nov. 15th.

The QUEEN v. HUNNINGTON.

ON appeal to the Staffordshire Quarter Sessions against an order for the removal of the wife of *John Parker* (who had deserted her), from the parish of Rowley Regis, in the county of Stafford, to the township of Hunnington, in the county of Salop, the sessions confirmed the order, subject to the opinion of this Court upon the following case :

A pauper gained a settlement in a parish, consisting of several townships, by hiring and service. At that time the parish had only one set of overseers. Afterwards separate overseers were appointed for each township.

Held, that the pauper did not thereby become settled in the particular township where he had served.

The pauper's husband is the son of *William Parker*, and has done no act to gain a settlement in his own right ; but his father, *William Parker*, about the year 1790, was hired and served for a year with one *Hawkeswood*, in the township of Hunnington, which at that time formed part of the parish of Hales Owen, in the county of Salop. At the time of such service, and up to the year 1832, the parish of Hales Owen consisted of the said township of Hunnington, the township of Oldbury, and ten other townships, all in the county of Salop, and three other townships in the county of Worcester. The three Worcestershire townships had always had separate overseers and supported their poor, and managed their parochial affairs apart from each other and the rest of the parish, but that part of the parish of Hales Owen which is in the county of Salop, and which consists of the township of Hunnington, the township of Oldbury, and ten other townships, formed a distinct district for the maintenance of its poor, and all parochial matters, up to the year 1832, and was known as the parish of Hales Owen, in the county of Salop, for which only one set of overseers of the poor were appointed, namely, four, who were annually appointed for the whole of the said last mentioned parish, and who, together with the churchwardens, made a joint rate, extending over the whole of the said last mentioned parish, and which formed one common fund for the general maintenance and relief of the poor, and for payment of all parochial charges for the last mentioned parish ; but each of the said townships, including Hunnington, had

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their respective headboroughs and repaired their highways separately.

In the year 1832 a mandamus was obtained, directing the justices of Salop to appoint separate overseers for the township of Oldbury; and, by the same authority, in the year 1834, separate overseers were appointed for the remaining eleven townships, including the said township of Hunnington, from which time separate overseers have continued to be appointed for all the said twelve townships, and each of the said twelve townships, from the time of such separation, has continued to maintain their own poor respectively as distinct and separate parishes.

The question for the opinion of the Court was, whether, upon the before mentioned facts, now that the said parish of Hales Owen had ceased to maintain its own poor, and separate overseers were appointed for the said twelve townships, the said paupers were settled in the said township of Hunnington.

If the Court should be of opinion that a settlement was gained in the parish of Hunnington, the order of sessions to be confirmed; if not, the order of sessions to be quashed.

F. V. Lee in support of the order of sessions. This case is not governed by *Reg. v. Tipton (a)*. There the pauper, who, before the appointment of separate overseers for the different townships of the parish of Hales Owen, was born a bastard in the parish workhouse, situate in the township of *Hales Owen*, was removed to that township as the place of its birth, whereas the mother had been sent to the workhouse from the township of *Oldbury*, and consequently the pauper, by stat. 54 Geo. 3, c. 170, s. 3, was removeable to the township of *Oldbury*, and not to the township of *Hales Owen*. If that case had decided that the pauper was not settled in *Oldbury*, it would have been in point. Wherever a district consists of several vills, which have the capacity of becoming places of settlement, provided they have paro-

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chial officers, then, so soon as such officers are appointed, the right possessed by such vills from time immemorial comes into operation retrospectively. In *Rex v. Oakmere* (a), a district previously extra-parochial was made a township, and it was held that a person born there previously to its becoming a township had no birth settlement there. But there the place was made a township by act of parliament, and *Abbott C. J.*, in delivering the judgment of the Court, seems to have relied upon this circumstance, when he observed, "This case arises on the act 52 *Geo. 3*, for inclosing the forest of Delamere, and the question is, whether the district newly created into a township under this statute, which before was neither in any parish nor township, is to be considered as if it had formerly been a parish or township with regard to settlements; or only as becoming so from the time of its creation under the act, and as if it had formerly been wholly uninhabited." "This is not like the case of a modern appointment of overseers to places that formerly had no such officers; because all such places must have been vills from time immemorial, and consequently under a legal obligation to maintain their poor, and possessing a legal right to the appointment of officers, and by such appointment to remove persons under the same circumstances as other townships or parishes might do." These observations are cited by Lord *Denman C. J.*, in his judgment in *Rex v. Oldbury* (b), and then his Lordship proceeds thus: "It seems to me, therefore, that if this township is an ancient division, which might formerly have maintained its own poor, then, when it obtained the right to have officers of its own, and to provide for its poor separately, it became liable to maintain those paupers whom it would have supported if it had been a separate division at an earlier period." The decision in that case was, that an order of removal acquiesced in, to the *parish* of Hales Owen, before its division into townships, separately main-

(a) 5 B. & Ald. 775; S. C. 1 D. & R. 427.

(b) 4 A. & E. 167; S. C. 5 N. & M. 547.

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taining their own poor, did not, on a subsequent removal of the same pauper to the township of Oldbury, estop Oldbury from shewing that the pauper was not settled in that particular township. [*Williams J. Rex v. Saughton on the Hill*(a) shews that the state of things at the time of gaining the settlement is to be looked to.] He then referred to *Rex v. Crowland*(b) and *Rex v. Merevall*(c), to shew that a settlement might be gained in a place which had no parish officers.

Corbett contra. *Reg. v. Tipton*(d) is precisely in point, and was decided on the general ground (without reference to stat. 54 *Geo. 3*, c. 170, s. 3) that the after-acquired capacity of the townships as places of settlement did not relate back to antecedent facts, in respect of which a settlement would have been acquired if they had occurred in a district then maintaining its own poor. (He was then stopped.)

Lord DENMAN C. J.—My remark in *Rex v. Oldbury*(e) was not adopted by the other members of the Court, and perhaps was not sound, as it is difficult to see how there can be an immemorial duty in a vill to maintain its own poor when it has no parish officers. No doubt the law applicable to such cases as the present is attended with great inconvenience. In *Rex v. Saughton on the Hill*(a), the township in which the pauper had last acquired a settlement had become extinct, yet it was held that the pauper could not be removed to another place, where he had been settled previously. The pauper therefore in that case could not be removed at all. Our decision in this case also must occasion inconvenience, but *Reg. v. Tipton*(d) is conclusive.

WILLIAMS J.—I am of the same opinion. This very point was disposed of in *Reg. v. Tipton*(d); it was there

(a) 2 B. & Ald. 162.

(d) 2 G. & D. 92.

(b) 8 B. & C. 711; S. C. 3 M. & R. 422.

(e) 4 A. & E. 167; S. C. 5 N. & M. 547.

(c) Burr. S. C. 661.

said that, before the separation of the townships, the settlement was not "in township A. or B., but in the district, where alone it could be gained, the parish." So here, looking back to the time when the settlement was acquired, where was the settlement? In the whole parish.

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COLERIDGE J.—I feel bound by authority; independently of that, I should have doubted on this question.

WIGHTMAN J. concurred.

Order of Sessions quashed.

SIMMONS v. WOOD.

Tuesday,
Nov. 14th.

DEBT. The first count of the declaration (reciting that the writ of summons in the action issued in July, 1843) stated, that heretofore, to wit, on the 21st day of June, 1839, by a certain indenture, &c. the defendant covenanted and agreed with the plaintiff to pay the plaintiff 900*l.* with 5*l.* per cent. interest, upon the 21st day of June then next ensuing; and, after stating defendant's default in paying on that day, went on to say, "and there is now due and owing for and on account of the said sum of 900*l.* and interest, a large sum of money, to wit, the sum of 1200*l.*, whereby an action hath accrued to the plaintiff to demand and have the same from the defendant."

Declaration in debt stated that defendant, by mortgage deed dated the 21st June, 1839, covenanted to pay 900*l.* and interest, at 5*l.* per cent., on the 21st June then next ensuing; that defendant made default, and that there was then due on account of the said sum of 900*l.* and interest, a large sum of money, to wit, the sum of 1200*l.*

Plea: non est factum, and issue thereon.

The plaintiff obtained a verdict at the last Staffordshire Summer Assizes.

On motion in arrest of judgment, it was objected that, as principal and one year's interest only could be recovered as a debt, the declaration was bad for alleging 1200*l.* to be due on account of principal and interest.

Held, that it did not appear from the declaration that only one year's interest was due on the 21st June, 1840, though that was the day on which it was to be paid; and that, even if it did, it still appeared that there was a good cause of action in debt for 945*l.*, and the averment that more was due might either be rejected as surplusage for the excess, or cured by entering a remittitur for such excess.

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Gray moved (a) to arrest the judgment, on the ground that 45*l.* only, the amount of one year's interest, could be recovered as a debt, in addition to the principal; that the count was therefore bad, as it demanded 1200*l.*, when 945*l.* only could be due; that it was necessary to set out a sum certain, so that the videlicet was immaterial, and that, if the amount, 1200*l.* were rejected, there would be no statement in the declaration of any amount at all.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was a motion by Mr. *Gray* to arrest the judgment in an action of debt on a mortgage deed, dated 21st of June, 1839, for payment of 900*l.* and interest at 5*l.* per cent., on the 21st of June, 1840. The action was brought in 1843, and the declaration averred that the defendant did not pay the 900*l.* and interest on the day appointed, but therein made default, and that there was then (at the time of the declaration) due and owing, for and on account of the said sum of 900*l.* and interest, a large sum of money, to wit, the sum of 1200*l.*, whereby an action had accrued to demand and have *the same* from the defendant.

It was said by Mr. *Gray*, that, as nothing could be recovered *as a debt* but the principal money and one year's interest to June, 1840, it was a fatal inconsistency to allege that there was 1200*l.* due and owing on account of the principal money and interest. But we do not think that there is any weight in the objection. In the first place, it does not appear by the declaration that only one year's interest was due on the 21st of June, 1840, though that is the day on which it is to be paid. But, even if it did, that circumstance would afford an answer to the objection, for it would then appear that the plaintiff had a good cause of action in debt to the amount of 945*l.*, and his averment that more

(a) On a former day in this term J., *Williams, Coleridge* and *Wightman* Js.
 (Nov. 2), before Lord *Denman* C.

was due to him might either be rejected as surplussage for the excess, or cured by entering a remittitur for the excess demanded, according to the cases of *Duppa v. Mayo* (a), *Thwaites v. Ashfield* (b), *Ingledeu v. Cripps* (c).

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Rule refused.

(a) 1 Saund. 282.

(b) 5 Mod. 213.

(c) 2 Ld. Raym. 814.

The QUEEN v. The Inhabitants of STOKE-UPON-TRENT.


Saturday,
Nov. 18th.

ON appeal to the Staffordshire Quarter Sessions against an order for the removal of a pauper, &c. from the parish of Stoke-upon-Trent to the parish of Trentham, both in the said county, the sessions quashed the order, subject to the opinion of this Court upon the following case :

The pauper's father was settled in the appellant parish. In the month of November, 1815, the pauper was hired by and served Messrs. *Bourne & Co.*, china manufacturers, in the respondent parish, from the 11th day of November, 1815, for nearly two years. After the pauper had been in the service some time, he signed a writing in a book, which was also signed by other workmen at different times, and was as follows :—" Plate and dish workers. This day agreed with *Ralph Bourne* to serve Messrs. *Bourne, Baker and Bourne*, from the 11th of November next, until the 11th of November, 1817, at prices, good out of oven, as per opposite side ; we agree to lose no time on our own account, to do our work well, and to behave ourselves in every respect as good servants. Witness our hands, the 10th day of January, 1815." This writing was signed by none of the masters, but was always left in their custody. On the opposite side of the book was a statement of the prices to be paid for the making of the plates and dishes at per dozen.

Where by written contract a workman engages to work at a particular trade for a year, parol evidence may be given that by the custom of the trade the workman is entitled to certain holidays in the course of the year, for, as the contract is in general terms and does not specify the particular times of service, such evidence explains and does not contradict the written contract.

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It was objected, on the part of the respondents, that the above writing was not a valid agreement, because it was not stamped, nor signed by the masters, but the objection was overruled, and the writing was read.

On the part of the respondents, evidence was offered to shew that an universal custom prevailed among china manufacturers to allow holidays at certain fixed times in the year to the platers and dishers, and that at these times the latter could, notwithstanding the above writing in the book, absent themselves from their work without their masters' permission. The evidence was objected to as inadmissible, and was rejected.

The pauper was called by the appellants, and proved that he was hired by and served Messrs. *Bourne & Co.* for nearly two years, from the 11th November, 1815, as a plater; that during that period he had his Sundays to himself, doing no work on those days; that he absented himself from his work at Easter for two or three days, and at the wakes, and in August, and that after these holidays he returned to his work. The pauper also proved that he always had work of his masters that he might have done on the play-days.

On the part of the respondents, the following question was asked the pauper:—"At the time of the hiring or signing the book, was any thing said as to the holidays or Sundays, that you were to have to yourself?" This question was objected to, as being a contradiction of the terms of the writing in the book; also the following question:—"Is it the custom of persons employed in the trade of dish and plate makers, under such a contract as this, to have certain holidays in the course of the year, and the Sundays to themselves?" This question was objected to, on the ground that evidence of the custom of the trade was inadmissible. The objections to both the questions were allowed by the Court.

The questions for the opinion of the Court were, first, whether the writing in the book was an agreement which

ought to have been received by the Court? Secondly, whether, under the circumstances stated, evidence was admissible to shew an universally prevailing custom among china manufacturers to allow platers and dishers holidays at certain fixed times of the year?

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Thirdly, whether the questions above stated, or any of them, were admissible?

If the Court were of opinion that the writing was an agreement that ought to have been received, and that the evidence of the custom was inadmissible, and that the questions were improper, then the order of sessions to be confirmed; but if the Court should be of opinion that the written evidence ought not to have been received, or that evidence of the custom was admissible, or that either of the questions was proper, then the Court of Quarter Sessions were to rehear the appeal.

Godson and *Whitmore* in support of the order of sessions. (The only point argued was as to the admissibility of the questions which were rejected by the sessions.) According to the written terms of the contract, a service under it for a year would confer a settlement; but, if an express exception of holidays from the period be ingrafted upon the contract, no settlement could be gained under it: *Rex v. St. Agnes* (a), *Rex v. Horwick* (b). The first question, therefore, was clearly inadmissible, as its object was to vary the written instrument.

The second question also, whether under such a contract it was not the custom of the trade for the men to have certain holidays was also inadmissible, and for the same reason and upon the authority of the cases already cited. [*Cole-ridge* J. Suppose absences from work to be proved, would not evidence be admissible to shew whether they were referable to agreement or to custom?] It would not, for the question would still be open, whether the master

(a) Barr. S. C. 671.

(b) 10 East, 489

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assented to the custom; and the absences are sufficiently explained by the statement in the case that the workmen returned, for this makes the absences referable to a dispensation *pro tanto*. The terms of the instrument were unequivocal, and the master might have enforced them by compelling the service for the entire year, exclusive of any customary holidays. This shews that the contract would be varied, and not merely explained, by engrafting the supposed custom upon it.

F. V. Lee and E. Yardley contra. Every contract of hiring has implied exceptions: 1 *Nol. P. L.* 377 (4th ed.); and "evidence of a custom regulating the matter to which the instrument relates, may be admitted to annex 'incidents to it,' though no allusion to any custom be made in the writing, provided the custom be not inconsistent with it:" 2 *Phill. Ev.* 764 (8th ed.). Did the proposed question then, as to custom, tend to any thing inconsistent with the contract? The contract is merely to work from such a date to such a date, and does not exclude the state of things supposed by the questions. It is said that the fact of the pauper returning after absences shews there was a dispensation, but that is not so, for it might be that wages were deducted after each absence.

LORD DENMAN C. J.—If evidence of the custom had been admitted, it might have convinced the sessions that no master or workman would have entered into such a contract, unless on the understanding that the custom of the trade with respect to holidays was to be imported into the contract. The evidence then would not contradict the written contract, for the contract is not merely to work from one term to another, but to work at a particular trade, and the custom of the trade might well serve to explain the contract. I think the sessions were wrong in rejecting the questions. The case must go back to be reheard.

[His Lordship then condemned the practice of submit-

ting a case to this Court in such a form that its decision could not be final(a).]

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PATTESON J.—The contract was general, and probably was made with reference to the custom. If the contract had been to serve day by day, the evidence of custom with respect to holidays would have contradicted the contract. But it was in general terms, specifying merely the commencement and the determination of the term of service. The evidence was therefore not inconsistent with the contract, and should have been admitted.

WILLIAMS J.—There was no stipulation as to the hours of work, so as to shew expressly that during every portion of the period of service the servant was to be under the dominion of the master. If any presumption may be made that the parties to such a contract would proceed with reference to the custom, on account of its general reception in the trade, the evidence should have been admitted.

COLERIDGE J.—It is commonly understood, I believe, that in contracts of this kind evidence may be given of the custom of trade, on the ground that it may be fairly presumed from the notoriety of the custom that parties contract with reference to it, although nothing to that effect is expressed. I do not therefore see how the evidence could contradict the contract.

Case sent back to the Sessions to be reheard.

(a) See *Reg. v. Wistow*, 1 G. & D. 681, and *Reg. v. Kesteven*, *ante*, 113.

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Thursday,
Nov. 23rd.

The QUEEN v. BURNBY.

By 3 & 4 Will. 4, c. 51, s. 29, a person making a false oath before any surveyor or inspector-general of the customs, on inquiries made by him for ascertaining the truth of facts relative to the customs, or the conduct of officers employed therein, is made liable to the pains and penalties of perjury.

By 3 & 4 Will. 4, c. 53, s. 112, "No indictment shall be preferred, or suit commenced, for the recovery of any penalty or forfeiture under this or any other act, relating to the customs or excise, (except in the case of persons detained and carried before one or more justices in pursuance of this act,) unless such suit shall be commenced "in the name of the attorney-general, or under the directions of the commissioners of customs or excise, or in the name of one of their officers, under their directions." The Court refused summarily to interfere by quashing an indictment under the first mentioned section, or by staying the proceedings, where it appeared that the indictment had not been authorised under the last mentioned section.

SIR F. POLLOCK A. G., on the first day of this term, obtained a rule to shew cause why the indictment in this prosecution should not be quashed, or why all further proceedings upon the same should not be stayed.

The affidavits in support of the rule stated that in December last a bill of indictment against the defendants for perjury was found at the Central Criminal Court. The indictment alleged the perjury to have been committed in certain evidence given by the defendant before one of the surveyors-general of the customs, on an inquiry into the conduct of a landing waiter. The indictment was removed by certiorari into this Court, and came on for trial at the London Sittings after last Trinity Term, when the Attorney-General, who appeared as counsel for the defendant, withdrew it, on the ground that it had not been instituted in the name of the Attorney-General, nor preferred under the directions of the Commissioners of customs or excise, nor commenced in the name of some officer of customs or excise, under the direction of the said Commissioners respectively, as required by stat. 3 & 4 Will. 4, c. 53, s. 112 (a). The affidavits stated that the proceedings had not been authorised according to the above provision.

(a) Stat. 3 & 4 Will. 4, c. 51, s. 29, enacts, "that upon examinations and inquiries made by any surveyor-general of the customs, or any inspector-general of the customs, for ascertaining the truth of facts relative to the customs, or the conduct of officers or persons employed therein, and upon the

like examinations and inquiries made by the collector and controller of any out-port in the United Kingdom, or of any port in the Isle of Man, or made by any person or persons in any of the British possessions abroad, appointed by the commissioners of his majesty's customs to make such examina-

Cockburn, M. Chambers, and Poulden, now shewed cause. It is entirely in the discretion of the Court whether or not to quash an indictment, and the Court will not quash an indictment except for insufficiency on the face of it, or indeed under any circumstances in a case of perjury. The defendant should either plead or demur, if the objection is good. On this point they referred to *Com. Dig. Indictment, (H.)*; *Rex v. Johnson (a)*; *Rex Belton (b)*.

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tions and inquiries, any person examined before him or them as a witness shall deliver his testimony on oath, to be administered by such of the surveyors-general, or such of the inspectors-general, or such collector and controller, or such person or persons as shall examine him, and who are hereby authorised to administer such oath; and if such person shall be convicted of making a false oath touching any of the facts so testified on oath, or of giving false evidence on his examination on oath before any of the surveyors-general or inspectors-general of the customs, or such collector and controller, or such person or persons, in conformity to the directions of this act, every such person so convicted as aforesaid shall be deemed guilty of perjury, and shall be liable to the pains and penalties to which persons are liable for wilful and corrupt perjury."

Stat. 3 & 4 Will. 4, c. 53, s. 112, enacts, "That no indictment shall be preferred, or suit commenced, for the recovery of any penalty or forfeiture under this or any other act relating to the customs or excise, (except in the cases of persons detained and carried before one or more justices in pursuance of this act,) unless such suit shall be com-

menced in the name of his Majesty's Attorney-General, or in the name of the Lord Advocate of Scotland, or unless such indictment shall be preferred under the direction of the Commissioners of his Majesty's Customs or Excise, or unless such suit shall be commenced in the name of some officer of customs or excise, under the direction of the said commissioners respectively."

Section 113 of the same act enacts, "That if any prosecution whatever shall be commenced for the recovery of any fine, penalty, or forfeiture incurred under this or any other act relating to the customs or excise, it shall be lawful for his Majesty's Attorney-General, or for the Lord Advocate of Scotland, if he is satisfied that such fine, penalty or forfeiture, was incurred without any intention of fraud, or that it is inexpedient to proceed in the said prosecution, to stop all further proceedings by entering a nolle prosequi, or otherwise, on such information, as well with respect to the share of such fine, penalty, or forfeiture, to which any officer or officers may be entitled, as to the King's share thereof."

(a) 1 Wils. 325.

(b) 1 Salk. 372.

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Stat. 3 & 4 Will. 4, c. 53, s. 112, which requires that every indictment shall be prosecuted under the authority therein mentioned, applies only to proceedings for pecuniary penalties.

Sir F. Pollock A. G., *Thesiger, Jervis, and F. Pollock*, *contrâ*. This application is either to quash the indictment, or to stay the proceedings. It may be most important that the evidence taken before the officers of the customs should not be made public; the inquiry before them is not constituted for judicial purposes, but in aid of a particular department of the public service, and it is necessary that they should be able to control any proceedings that arise out of such an inquiry. Section 112 was clearly directed to all proceedings whether by way of indictment, or with a view to mere punishment by way of suit for penalty, and the section is to be read with a stop after the word "preferred," and the word "suit" only to be read in connection with the words "for the recovery of any penalty or forfeiture." In the cases cited against the present application, it was the defendant who moved to quash the indictment; in this case the application is made by those who are exclusively authorised to prosecute. [*Coleridge J.* Section 116 seems to assume that the indictment must state that it has been duly authorised, for it provides that in any proceedings, "the averment that the commissioners, &c., have directed, &c., such proceedings, &c., shall be sufficient without proof, &c., of such fact, &c., unless the defendant in such case shall prove the contrary."] It may be said that the Attorney-General may interfere by *nolle prosequi*; but this would not be a discreet exercise of his power; it is much better that the proceedings should be stayed by a court of justice, than by a public officer summarily, and as it were *ex parte*. [*Wightman J.* referred to section 27 of the former act, with respect to a prosecution for forgery, and to section 53 of the later act, with respect to the proceedings against persons making signals to smugglers.]

Lord DENMAN C. J.—It appears to me that there are great, not to say insurmountable, difficulties in the way of this application. By the 29th section of the former act, a liability is created generally to the pains and penalties of perjury; and I am not sure that the 112th section, which requires proceedings to be instituted under special authority, is applicable to an indictment for perjury under the former section; the section rather appears to me to apply to offences directly against the customs and excise laws. If it was necessary that this prosecution should be instituted by authority, I do not know whether it would be necessary that the indictment should aver the fact of such authority. If, however, the averment is necessary, we need not interfere, for the objection may be taken in arrest of judgment. As to staying the proceedings, that is a matter for our discretion, and I think we ought not to take such a step. If there is anything like oppression or conspiracy in the prosecution, the Attorney-General may stay the proceedings, by exercising his ordinary control over prosecutions. I agree that he should be loth to interfere where his interference might deprive any person of the opportunity of vindicating his character. But, if this objection to a summary interference applies to him, it applies to us in a ten-fold degree, for he has means of information for his guidance which are not open to us. I hardly think that any case could be laid before me on affidavit, so as to induce me to interfere.

WILLIAMS J.—The question is confined within narrow limits, namely, whether the defendant, assuming that he both deserves and requires protection, should obtain it at the hands of the Attorney-General or of the Court. The perjury, if committed at all, has no doubt been committed under peculiar circumstances, inasmuch as the power to administer the oath is a special power given by the act, but it does not follow from this that the perjury may not have been marked by the greatest malignity. Why, therefore,

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should the ungracious task of interfering to stay this prosecution be cast upon the Court? If the Commissioners ascertain that the prosecution is oppressive, they can apply to the Attorney-General for a remedy.

COLERIDGE J.—This is an indictment for a very grave offence, and the spirit of all the authorities is, that an indictment should never be quashed where the propriety of such a course is open to the least doubt. Can it be said that there is no doubt in this case? I think the case is within the 112th section of the statute, but still I have doubts on the subject. Again, a question has been raised whether the leave to institute the prosecution, if the case is within that section, should not be averred in the indictment. I have doubts on that point also, which are sufficient to make me unwilling to interfere. By declining to interfere, we do no injustice, for, if the leave of the Commissioners or other officer is necessary to make this prosecution legal, it is quite clear that the defendant has other modes open to him of setting the matter right. If this proceeding has been taken behind the backs of those who alone could give authority for its institution, it is the very case in which the Attorney-General should act on his own responsibility, and not call on us to interfere.

WIGHTMAN J.—The arguments in support of this rule would equally apply to a prosecution for forgery, under the 27th section of the earlier act. Such a forgery might produce the most mischievous effects to a third person, and yet, according to the argument for the prosecution, it might be stopped by the summary interference of this Court.

Rule discharged.



1843.

Wednesday,
Nov. 15th.

The QUEEN v. BAMBER.

INDICTMENT for non-repair of a road. The indictment stated, that from time whereof, &c. there was and yet is a certain common and public highway, leading from the hamlet and village of Blackpool, in the county of Lancaster, towards and unto the hamlet and village of Bispham with Norbreck, in the said county, used for and by all the liege subjects, &c. with their horses, carts and carriages, at their free will, &c. And that a certain part of the said common and public highway, lying and being in the township of Layton with Warbreck, in the said county, commencing at a certain gate in the road there, abutting on the boundary between the township of Bispham with Norbreck aforesaid, and the township of Layton with Warbreck, and extending from thence in a southerly direction within the township of Layton with Warbreck, for the space of 131 yards, and of the length of 131 yards, and of the breadth of 6 yards, on the 1st of June, 1842, and from thence until, &c. was and yet is very ruinous, broken and in great decay for want of due restoration, reparation and amendment of the same, so that the liege subjects, &c. could not go, return, &c. And that *Thomas Bamber* the younger, of the township of Layton with Warbreck aforesaid, by reason of his tenure of certain lands and tenements situate in the township of Layton with Warbreck aforesaid, in the county aforesaid, called the Gyn, ought to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, broken and in decay, when and so often as there should and might be occasion, and that the said defendant had not done the same.

Plea: not guilty.

that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had shortly before the finding of the indictment made an encroachment and washed away part of the highway alleged to be out of repair, and washed away large quantities of the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank of about seventy feet.

Held, that defendant was entitled to judgment.

Indictment in the common form for not repairing a highway, alleging defendant's liability *ratione tenuræ*.

A special verdict found that defendant's land adjoined the sea; that anciently a highway went over this land and that defendant's predecessors had repaired it, &c.; that within living memory the sea had encroached, and that the ancient highway was covered by the sea; that defendant's predecessors had from time to time gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea coast, and

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The indictment was tried at the quarter sessions for Lancashire, in January, 1843, and the following special verdict was returned :

That from time whereof the memory of man is not to the contrary, there have been and still are (except and subject as hereinafter mentioned) certain ancient lands and tenements, situate in the township of Layton with Warbreck aforesaid, in the county aforesaid, called the Gyn, being the same lands and tenements in the said indictment mentioned, and by reason of the said *Thomas Bamber* the younger's tenure whereof it is by the said indictment supposed that the said *Thomas Bamber* the younger ought to restore, repair and amend the said part of the said highway, so being ruinous broken and in decay as aforesaid; and the same ancient lands and tenements have during all the time aforesaid belonged unto and been holden by the same *Thomas Bamber* the younger, and those whose estate he now hath, and at the taking of the said indictment had, of and in the same, and still belong to and are holden by the same *Thomas Bamber* the younger (except and subject to as hereinafter mentioned); but that the same township of Layton with Warbreck adjoins to the seacoast and is liable to encroachments by the sea, and that the sea has from time to time, within living memory, made encroachments in and upon the said ancient lands and tenements, and carried away the soil and earth of the same, so that part of the same space auciently occupied by the said ancient lands and tenements was, at the time of the taking of the said indictment, and now is, occupied by the sea; and that there was from time immemorial and now is (except and subject as hereinafter mentioned) a certain ancient common and public highway, leading and used as in the said indictment mentioned, and part whereof passed and passes over the said ancient lands and tenements; and that from time immemorial (subject and except as aforesaid, and as hereinafter mentioned) the same *Thomas Bamber* the younger, and all those whose estate he now

hath, and at the taking of the said indictment had, of and in the said ancient lands and tenements, have restored, repaired and amended, and ought of right to have restored, repaired and amended, and he the said *Thomas Bamber* the younger ought now to repair and amend so much of the same highway as passes or passed over the said ancient lands and tenements, and that the encroachments of the sea have, within living memory, from time to time extended into and over the said ancient highway, so that a portion of the land over which the same ancient highway went, now is, and at the time of the taking of the said indictment was, covered by the sea and impassable. Wherefore those whose estate the same *Thomas Bamber* the younger now hath as aforesaid have from time to time gradually removed the same ancient highway and appropriated other parts of the said ancient lands and tenements for the site thereof, so as to keep the same along but on the landward side of the seacoast, and so that the public have had the uninterrupted use of a road for the purposes of the said ancient highway, and that the same road hath always been repaired by the said *Thomas Bamber* the younger, and those whose estate he hath as aforesaid, as or in lieu of so much of the said ancient highway; and that the said part of the said common or public highway mentioned in the said indictment, and supposed thereby to be ruinous, broken and in decay, was at that time, when the same is by the same indictment supposed so to be ruinous, broken and in decay, and still is, part of the said ancient highway so going and passing over the said ancient lands and tenements called the Gyn, and used by the public as aforesaid, though going and passing over a different part of the same ancient lands and tenements from that formerly occupied by any part of the said ancient road and now occupied by the sea as aforesaid; and that in the month of March last the sea made an encroachment in and upon the same part of the said common and public highway so supposed by the said indictment to be ruinous, broken and in decay, and washed

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and carried away large quantities of the earth and soil thereof, and that the same part of the said common and public highway then and there became and was and ever since hath been uneven and very ruinous, broken and in great decay, for want of due restoration, reparation and amendment of the same, so that the liege subjects of the Queen, during the time last aforesaid, could not go, return, pass, repass and labour with their horses, carts and carriages, along and over the same highway as they ought and were accustomed to do, in manner and form as in the said indictment specified, and that the said *Thomas Bamber* the younger hath not restored the same, but that a portion of the same part of the same highway now has, and ever since the said month of March last past had, the earth and soil thereof washed away by the sea, and was and is made impassable, and the residue of the said road thereby became and was and is too narrow for passage, and was made to stand and now stands at the edge of a precipitous bank of the depth of seventy feet, or thereabouts, and shelving down to the sea, at an angle to the horizon of forty-five degrees, or thereabouts, and it would cost a very great sum of money to make a passable road over the same space that was occupied by such road up to the month of March last past. But whether, &c.

Upon this finding, judgment was entered for the crown, and the defendant adjudged to pay a fine of 1s.

Error having been brought, the case was now argued by

Cowling for the plaintiff in error. To establish the liability of the defendant (below) *ratione tenuræ*, it should appear that the highway is ancient; that defendant was bound to repair *ratione tenuræ*; and that the road is out of repair through his default. Now, as to the first point, the verdict finds that the highway is an immemorial highway; subject to what is afterwards stated, viz. that the highway has been changed from time to time as the sea encroached. The finding, therefore, is in effect that the highway *now*

out of repair is not an ancient highway. And with reference to this finding, it must be remembered that the indictment does not charge the defendant with not providing a road in lieu of that which has been washed away, as it should have done, but with not repairing the old road.

Secondly, the alleged liability has not been established, for it appears that what defendant and his predecessors have done is, that they have found another road whenever the old road has from time to time been washed away, and not that they have repaired the old road.

Thirdly, it is not found that the highway is ruinous through the default of the defendant. The ordinary liability in such cases as the present is merely to repair the surface, but the special verdict shews that the whole earth, to the depth of about seventy feet, has been carried away. It is clear, therefore, that it is sought to charge the defendant with the repair of a sea bank, and not of a road. The latter liability cannot be enforced by a proceeding of this kind; it should be enforced by the commissioners of sewers. If a question upon such a liability could arise under this indictment, it is at all events clear that the whole level is liable, unless there has been default upon the part of the individual bound by prescription or otherwise to repair: *Rex v. Commissioners of Sewers for Essex* (a), per Abbott C. J. In *Reg. v. Inhabitants of Paul* (b) it was distinctly held that, on an indictment for the non-repair of a highway in the ordinary form, a parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged way used to pass. In that case *Maule J.* observed, "In ordinary language this cannot be said to have been, at the time of the default, a highway which the public were prevented from conveniently using, for want of due reparation and amendment. It was at one time, at most, a wall or embankment, on the top of which there was a road; and whatever might have been the duty

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(a) 1 B. & C. 484; S. C. 2 D. & R. 700.

(b) 2 M. & Rob. 307.

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of the parish as to a road so in existence and requiring repair, I do not think they are defaulters on this evidence. The interruption of the passage is not from the want of repair, but from the sea having washed away the wall or embankment; and there is no longer any thing for them to repair. I do not think they are liable to rebuild the wall."

Baines contra. It is not necessary either to aver or to prove that the highway is immemorial: *Rex v. Stoughton* (a). The precise road which a person is called on to repair need not have existed from time immemorial. If another road has been substituted for the old road, the liability will attach to the substituted road. A highway may be changed by act of God; and with respect to rivers, if water, which has been an ancient highway, change its course and go over different ground from that whereon it used to run, yet the highway continues in the new channel in the same manner as in the old: *Hawk. P. C.* (b), bk. 1, c. 32, s. 4. *Prima facie* the frontager is bound to defend against the sea, and he may be indicted if he neglects to do so; and the mere ownership of a bank is a sufficient warrant to impose the charge of repairs on a person without prescription: *Callis on Sew.* 115. [*Wightman J.* The indictment does not allege that defendant was bound to keep the sea out.] It should have been shewn in defence, if it forms any defence at all, that the damage was caused by the sea. [*Coleridge J.* The liability to repair the substituted road seems to differ from the liability charged in the indictment. Is the defendant to repair the old road or to make a new one?] To repair the old. [*Coleridge J.* How can that liability attach on the new road?] If the public take to the new road, it does not lie in the defendant's mouth to say it is not the road which he is liable to repair. It does not appear in this case that ordinary prudence on the part of the defendant might not have prevented the mischief; if it

(a) 2 Wms. Saund. 158 n. (4), 6th ed.

(b) Curwood's ed.

might, the defendant is liable: *Keighley's case* (a). It is therefore not like the case of *Reg. v. Paul* (b), where the defendants could not have repaired without trespassing on the property of others.

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LORD DENMAN C. J.—I do not think so much of the fact that the old line is gone; but it appears that the earth itself has been swept away. What authority is there for saying that the defendant is liable to create a new earth?

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

Judgment reversed.

(a) 10 Rep. 139.

(b) 2 M. & Rob. 307.

OLIPHANT v. BAYLEY.

Thursday,
Nov. 16th.

ASSUMPSIT for the price of a two-colour printing machine and apparatus connected therewith. Plea: non assumpsit.

At the trial before *Cresswell J.*, at the Liverpool Summer Assizes, it appeared that the plaintiff was the patentee of a machine called "Oliphant's Patent Two-colour Printing Machine," for the purpose of printing calico with two colours. This machine had been exhibited and was known, and it appeared that the defendant had himself seen it on the plaintiff's premises, but it did not appear that it was working at the time. The defendant having applied to the plaintiff respecting a similar machine to be put up on his own premises, the plaintiff answered by the following written proposal: "I undertake to make you a two-colour printing machine on my patent principle." (The proposal then stated the price, dimensions, &c.) The machine was accordingly ordered by the defendant and put up, together with a certain apparatus connected with it. The defence was, that the machine turned

Where defendant orders of plaintiff a machine, previously known and ascertained, for which plaintiff had a patent, it is no answer to an action for the price of the machine, that it did not answer the purpose specified in the patent, although it is not shewn that the defendant had had previous opportunities of exercising his judgment as to the usefulness of the machine.

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out useless, as the colours ran together. The learned judge left it to the jury to say, as to the machine, whether it was a previously known and ascertained article; as to the apparatus, whether it was put up in accordance with the defendant's directions. If they found these questions affirmatively, the verdict to be for the plaintiff for the respective portions of the claim. Verdict for the plaintiff.

Wortley (a) moved for a new trial on the ground of misdirection. There was no proof in this case that the defendant knew anything of the character or value of the machine; he had had no opportunity of forming a judgment respecting it, and relied on the judgment of the seller. The principle laid down by *Tindal* C. J. in *Brown v. Edgington* (b) consequently applies: "When the buyer relies on the judgment of the seller, and informs him of the particular use to which the article is to be applied, it seems to me that the transaction carries with it an implied warranty that the thing purchased shall be fit and proper for the purpose for which it was designed:" *Shepherd v. Pybus* (c), *Jones v. Bright* (d). It is not precisely the case of a warranty, but it is, on the part of the seller, a breach of contract, in not making the thing he promises to make, viz. an article useful for a particular purpose. If, indeed, the question had been left to the jury, whether they believed that the defendant acted on his own judgment, there would have been no room for the present motion. But in that case the verdict would have been for the defendant, for it is clear, upon the evidence, that the defendant had no opportunity of forming a judgment.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the

(a) Nov. 4, before Lord Denman C. J., *Williams, Coleridge and Wightman* Js.

(b) 2 M. & Gr. 279; S. C. 2

Scott, N. R. 496.

(c) 4 Scott, N. R. 434.

(d) 5 Bingh. 533; S. C. 3 M. &

P. 165.

Court.—This action was brought for the price of a patent two-colour printing machine, and certain apparatus to it. We have referred to the learned judge who tried the case, and to whose direction an objection was taken. That direction was, that, if the patent two-coloured printing machine was a known and ascertained article, the defendant, having ordered one, must pay for it, whether it answered his purpose or not; but that if it was not a known and ascertained article, and the defendant ordered a machine for printing two colours, and the plaintiff undertook to supply it, he could not recover the price unless the machine supplied was reasonably fit for the purpose for which it was ordered: *Chanter v. Hopkins (a)*. With respect to the apparatus connected with the machine, the learned judge left it to the jury to say whether it was constructed according to the defendant's directions, and whether it was reasonably fit for the purpose for which it was ordered. The jury found these questions in favour of the plaintiff. We are of opinion that the direction of the learned judge was correct, and the verdict right.

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Rule refused.

(a) 4 M. & W. 399.

The QUEEN v. BADGER, Esq. and another. (b)

ERLE, in Michaelmas Term, 1843, obtained a rule calling upon the defendants, who were magistrates for the county of Stafford, to show cause why a criminal information should not be filed against them, for refusing to take bail under the circumstances detailed below in the judgment of the Court.

Where a person is apprehended on a charge of using seditious language, a magistrate has no right to reject bail on account of the character or political opinions of such

(b) Decided in Hil. Vac. 1843, (Feb. 11.)

bail, if he is satisfied of their pecuniary sufficiency.

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Sir *W. W. Follett*, S. G. and *Waddington* shewed
 cause. (a)

Erle and *Boothby* supported the rule.

Cur. ad. vult.

LORD DENMAN, C. J. delivered the judgment of the Court as follows:—We have thought it our duty to read the affidavits, and give full consideration to this very important case, and explain the reasons of our decision. If our remarks should affect any further legal proceedings, our silence might be followed by the same inconvenience, which, indeed, is inseparable from the exercise of that jurisdiction which we are now asked to bring into operation. This application was made on behalf of *Arthur George O'Neil*, who was apprehended for seditious language, said to have been used at an unlawful assembly held at *Dudley* last August, and he was taken before Mr. *Badger* and the Rev. Mr. *Cartwright*, two magistrates of the county of *Stafford*, upon that charge. They required him to find two sureties of 100*l.* each for his appearance to take his trial, and be of good behaviour in the mean time; but, when two persons of the name of *Page* and *Trueman* were tendered to the above-mentioned magistrates as his bail, they were refused, though perfectly solvent and in respectable circumstances (being town-councillors of Birmingham, for which office they must possess a qualification of 1000*l.* over and above what would pay their debts), on the alleged ground that they had attended Chartist meetings; the two magistrates assigned no other reason, though they stated they had other reasons. For this refusal a rule for a criminal information was granted, which has been discussed on shewing cause.

The affidavits in answer to the rule disclose facts which

(a) In Hil. T. Jan. 27, before Lord *Denman* C. J., *Patteson* and *Wightman* Js.

prove that a highly disturbed and alarming state of things existed in the neighbourhood at the time the bail were tendered. It appears that large numbers of colliers and other workmen had withdrawn from their employ, and had commenced acts of extreme violence, inciting other workmen and even proceeding to the destruction of property, to intimidation and riot. Large meetings of such persons were held, whose passions were inflamed by seditious harangues addressed to them by strangers travelling about the country under the name of Chartists; there was imminent danger that the peace would be broken and anarchy become universal. Her Majesty had denounced the proceedings on the 13th of August by a proclamation, which called upon the magistrates to act with promptitude and vigour in the suppression of such meetings and the apprehension of the offenders. By the magistrates and police, aided by special constables and the military, which were absolutely indispensable, such meetings were prevented or dispersed, and the parties accused of breaking the peace were arrested and handed over for trial in the courts of justice.

O'Neil, who has obtained this rule, is one of the persons against whom information of misconduct was laid on oath before the magistrates, and we understand he is to take his trial on that charge; we shall therefore abstain from comment on all particulars alleged against him. But the Court is bound to express an opinion upon some of the topics enlarged upon at the bar and on the nature of the proceedings.

The right of workmen to meet together for considering the amount of wages, or of any of the Queen's subjects freely discussing public grievances, is foreign to this case. The complaint is, not that workmen assembled to devise means for bettering their condition, but that others took advantage of their quarrels with their masters, and, finding vast numbers unemployed, ignorant and disaffected, sought to incite them to every kind of outrage; not that the discussion of public grievances had been intemperately con-

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ducted, but that at tumultuous assemblies, rendering all discussion impossible, speeches and conduct had occurred, calculated to lead to violent meetings, outbreaks, conflicts with lawful authorities, and almost certain bloodshed, and very probably to universal pillage. Whether or not these meetings had been held in the immediate neighbourhood of Dudley is of small importance : they had been held in other quarters, producing their natural results, and were rapidly extending. It is sworn that near Dudley a population of half a million of persons were expected to follow this example ; and in this state of things the meeting in question was announced. It was observed, on the argument, that few deeds of violence were actually committed in that district, and those by no means of a formidable character ; if that be so, we have no doubt, when we regard the materials and the instruments of mischief that were prepared, that it is to be ascribed to the vigilance, the spirit and real humanity with which the magistrates enforced the law, as her Majesty's proclamation enjoined them : we think them entitled to the gratitude of their Sovereign and the country, and that they would have deserted their duty if they had not committed *O'Neil* for trial for the part he was proved to have taken at the meeting, which they most properly dispersed on the 26th of August.

At this point of time, a new state of things has arisen : the law has been fully vindicated ; the seditious assembly has been dissolved ; the agitators, as they called themselves, are withdrawn from it without serious interruption and secured, that their imputed offences may be investigated before a jury. Standing charged with a misdemeanor, *O'Neil* claims the right of every man so charged, to be released from prison and admitted to bail on producing sufficient sureties. He says he tendered such to the magistrates, who refused to receive them, not from an objection to their sufficiency, but from corrupt, partial and arbitrary motives, with the determination to keep him in prison, when their

duty required them, under the circumstances, to bail him and release him out of custody.

We have first to consider whether this refusal was a lawful act, a point on which no serious doubt was entertained. Neither of the learned counsel who opposed the rule contended that a magistrate can lawfully reject bail at his own discretion, or is at liberty when bail is offered to enter into an investigation as to the character and opinions of such bail, provided he is satisfied of their sufficiency to answer for the appearance of the party in the amount reasonably required for that purpose. The law is clear, and is as old as the statute of Westminster 1, 3 *Edw.* 1, c. 15. Lord Coke, in his commentary upon that statute (2 Inst. 191), says, that "to deny a man plevin that is plevisable, and thereby to detain him in prison, is a great offence and grievously to be punished." And Lord Hale (a) adopts the same remark, and Hawkins (Part 2, c. 15, s. 13) (b) speaks of refusals of bail as an indictable offence. Blackstone, referring (4 Com. c. 22, p. 297) to the ancient statute, the Habeas Corpus (c) and the Bill of Rights (d), calls it "an offence against the liberty of the subject." If then such refusal took place from improper motives, it might be treated as a criminal offence, and made subject to an indictment or information.

The affidavits on which the rule was granted accused the magistrates of motives corrupt, partial, personal and arbitrary. But even the deponents themselves do not mean to charge pecuniary corruption, or personal malice, or partiality in the sense of giving an unfair advantage to one litigant party over another. The only censurable feelings that can with any show of reason be suspected are a pre-meditated refusal and disregard of the just claim made by *O'Neil* for his liberation, and a determination to keep him in prison without legal authority and in contempt of their

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(a) 2 Pl. Cr. p. 135, part II. c. 15.

(c) Stat. 31 C. 2, c. 2.

(b) 3 Hawk. Pl. Cr. p. 189, 7th ed.

(d) 2 Stat. 1 W. & M. c. 2.

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duty. The affidavits on both sides are much the same in substance, in respect of all that occurred before the magistrates. The facts being clear, the question is whether a criminal information ought to be filed ; and this depends on our view of the motives which influenced the magistrates.

And we must advert to the very questionable character of one line of defence which they appear to insinuate rather than avow. They depose that, some time previous to the apprehension of *O'Neil*, these deponents consulted with their brother magistrates as to the nature of the bail to be taken by them in the case of persons committed for attending illegal meetings, for using seditious language, and particularly for inciting to outrages, inasmuch as the disturbances were then going on in certain districts in Staffordshire and in the neighbourhood of Dudley, and resistance to the laws was fomented and kept up by the inflammatory and exciting speeches and conduct of persons who were Chartists. They debated whether, if they were called upon to accept, as bail for the appearance or good behaviour of individuals charged with any of these acts of sedition, persons who had taken a prominent part in the proceedings of the Chartist body, it was advisable to receive them ; and it is sworn that these deponents and the other magistrates, wholly uninfluenced by any corrupt, perverse, vindictive, personal or partial motive, but, as they believed, in a fair and legitimate exercise of their office, in their performance of their duty as magistrates, and with a view only to the preservation of the peace, decided that such persons ought not, in the then state of the country, to be admitted as bail, and ought not so to be accepted by them. They further say that after the commitment of *O'Neil*, the same decision was again considered by the magistrates, and was agreed to by the Lord Lieutenant of Worcestershire, who thought it was a proper decision. Another magistrate, *Mr. Molyneux*, states also this resolution, and informs the Court that, if he had been called upon to accept such

persons as bail for any one charged with the same offence, he would also have rejected them.

Now, the assumption of powers not given by the law appears to us peculiarly ill-judged at a period of political disturbance, and not to be palliated but rather rendered so much the more culpable, if deliberately done by high functionaries having a judicial duty to perform. And, if we had found any magistrate wilfully adopting such a measure in defiance of the known law, the encouragement so given would have compelled us the more strongly to mark our disapprobation of his conduct.

This proceeding, however, gives the parties challenged an opportunity of explaining the state of mind in which they acted. And we find them expressly swearing that they thought they were acting in the fair legitimate exercise of their office, and in the performance of their duty as magistrates. We may regret that the question of law was not more carefully examined. Almost the first page of their ordinary text-books would have convinced these gentlemen that their refusal, on such a ground, to receive the bail offered, was not a legitimate exercise of their office, or a proper performance of their duty as magistrates, but on the contrary. Their opinion that it was right was hastily adopted in a crisis of real danger, and, most probably, from a deference to the general resolution, which induces us, in conformity to the rule by which this Court has regulated its practice, to decline interfering by criminal information.

We shall therefore discharge the rule. But, as the conduct of the magistrates was such as to justify the application, they must pay all the costs attending it.

Rule discharged : the defendants to pay to the prosecutor the costs of and attending this application.

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The QUEEN v. The Inhabitants of ST. ANDREW'S,
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Where a lunatic pauper, whose settlement cannot then be ascertained, has been removed to an asylum under stat. 9 Geo. 4, c. 40, s. 41, and afterwards, on inquiry under sect. 42, an order of justices is made, ascertaining and adjudicating the place of his settlement and directing the expenses of his removal to be paid by the parish in which he is settled, the order must not direct such expenses to be repaid to the removing parish, as the treasurer of the county is the only person entitled to such repayment.

ON appeal against an order made by two justices for the borough of Droitwich, in the county of Worcester, on the 24th September, 1841, whereby the settlement of *John Hughes*, a lunatic pauper, confined at a house in Droitwich licensed for the reception of lunatics, was adjudicated to be in the parish of St. Andrew, Worcester, and whereby also the churchwardens and overseers of that parish were ordered to *repay to W. W., one of the overseers* of the poor of the parish of St. Peter, in Droitwich, the sum of 14*l.* 2*s.* for the removal of the said lunatic to, and for his maintenance, &c. in, the said licensed house, from the 13th April, 1841, to the day of the date of the said order; and whereby also the said churchwardens and overseers of the said parish were ordered to pay to the keepers of the said licensed house the weekly sum of 12*s.* for the future maintenance, &c. of the said lunatic, the order was confirmed, subject to a case.

It appeared from the case that, on the 13th April, 1841, the pauper, then being chargeable to St. Peter's, Droitwich, and insane, was removed under an order of that date, made by two justices of Droitwich, to a house at Droitwich duly licensed for the reception of lunatics; there not being a county lunatic asylum in Worcestershire. The pauper's settlement could not be ascertained at this time.

Afterwards, on the 24th September, 1841, two justices of Droitwich made the order now in question, which, after reciting the above facts, and that the pauper had been and was then confined in the said licensed house under the order of the 13th April, proceeded thus: "Now we (the justices) have, on this 24th day of September now instant, duly inquired into the last legal settlement of the said *John Hughes*, and on the oath of *Phabe Hughes*, his mother, are satisfied that the last legal settlement of the said *John*

(a) Decided in Easter Vac. 1843 (May 17).

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Hughes is in the parish of St. Andrew, in the city of Worcester aforesaid: We (the said justices) do therefore, upon due proof made before us upon oath, and upon due consideration had of the premises, adjudge that the last legal settlement of the said *John Hughes* is in the parish of St. Andrew, in the city of Worcester aforesaid; and we, the said justices, do hereby order and direct the churchwardens and overseers of the poor of the said parish of St. Andrew, upon notice of this our order, to repay unto *William Wyld*, one of the overseers of the poor of the said parish of St. Peter, the sum of 14*l.* 2*s.*, for the removal of the said *John Hughes* to, and for his maintenance, medicine, clothing and care in the said house, &c. so licensed as aforesaid, for the reception of insane persons, from the said 13th day of April now last past to the date of this our order, such charges having been duly proved to the satisfaction of us the said justices." The order then directed payment of a weekly sum to the proprietors of the licensed house for the pauper's future maintenance.

This order was appealed against. The only ground of appeal material to this report was, "that the order was bad on the face of it, as it directed the repayment of 14*l.* 2*s.* by the churchwardens and overseers of the parish of St. Andrew, to *W. Wyld*, one of the overseers of St. Peter's, Droitwich, instead of directing the said money to be repaid to the treasurer of the county of Worcester, according to the stat. 9 Geo. 4, c. 40." The sessions at the trial overruled this objection.

If the Court should think the objection good, then the order of sessions to be dealt with as the Court should think fit.

Whitmore and *Selfe* in support of the order of sessions (a). Repayment might properly be directed to be made to the parish in which the lunatic had been found. It is true that, before the settlement was ascertained, the parish in which the

(a) In Mich. Term, 1842 (Nov. 9), before Lord Denman C. J., *Williams*, *Coleridge* and *Wightman* Js.

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lunatic was found might have obtained an order under stat. 9 Geo. 4, c. 40, s. 41, directing the county treasurer to pay the charges of removal, &c. But, if the parish did not then choose to obtain an order for repayment by the treasurer, it might still, after the settlement had been ascertained, obtain such an order against the parish of the settlement, for section 41, which applies to the case of a settlement ascertained after pauper's removal to an asylum, merely says that the parish of the settlement may be ordered to repay the charges of removal, but does not say to whom the repayment is to be made. It would be absurd that the order should direct repayment to the treasurer, if in truth he has never made any payment. At all events, if so much of this order is wrong, it may be held good for the residue (a): *Rex v. Maulden* (b), *Rex v. St. Nicholas, Leicester* (c).

F. V. Lee and *Beadon* contra. By section 41, where a lunatic pauper's settlement is not ascertained before removal to the asylum, the expenses of such removal are to be paid by the treasurer; an order, cannot therefore, direct repayment to any one else. This is distinctly laid down by *Patteson J.* in *Reg. v. Darton* (d): "I think that the magistrates cannot in any case order payment to be made to the overseers of the removing parish. If the place of settlement is known, an order for the expenses may at once be made upon the overseers of the place of settlement under section 38; if unknown, it may be made upon the county treasurer. If the overseers do not chuse to obtain either order, it is their own fault. The order for repayment must be made upon some one who was legally obliged to pay at first. That seems in the present case to have been the county treasurer."

Cur. adv. vult.

(a) This seemed to be admitted by the appellants.

(b) 8 B. & C. 78; S. C. 2 M. & R. 146.

(c) 3 A. & E. 79; S. C. 4 N. & M. 624.

(d) 12 A. & E. 78; S. C. 3 P. & D. 483.

WILLIAMS J. delivered the judgment of the Court.— This is a case arising upon the statute of 9 Geo. 4, c. 40, and reserved for our opinion by the Court of Quarter Sessions for the county of Worcester, from which it appears that two justices of the borough of Droitwich, by order of the 19th April, 1841, caused a pauper lunatic to be conveyed to a house duly licensed for the reception of insane persons. On the 24th September, 1841, two other justices of the said borough of Droitwich made an order, whereby, after adjudging the settlement of the said lunatic pauper to be in the present appellant parish, they directed the parish officers of the same to pay to A. B., one of the overseers of the poor of the said parish of St. Peter, a certain sum therein specified, in respect of charges incurred about the care and maintenance of the said pauper lunatic. Against this order the parish of St. Andrew appealed, and the same was by the sessions confirmed, subject to the opinion of this Court. There were several objections taken on behalf of the appellants, but into those different objections, however, we do not consider it to be needful to enter, because there is one which seems to us to be clearly fatal to the order. In *Reg. v. Pixley (a)* we had occasion to advert to the different sections of the act regulating the manner of making reimbursement in these cases, and the persons to whom it is to be made, and in none of them is there any provision enabling the justices to direct the sum to be reimbursed to be paid to the overseer of the parish or place to which the pauper lunatic may have been chargeable. Inasmuch therefore, as their jurisdiction depended entirely upon the statute, and it is not given to them in the form adopted, we think that the order of sessions cannot be sustained, and that it must accordingly be quashed.

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Order of Sessions quashed.

(a) 3 G. & D. 96:

1843.

Thursday,
Nov. 23rd.

Where under stat 5 & 6 Will. 4, c. 50, ss. 94 and 95, justices at special sessions make an order, directing an indictment to be preferred for non-repair of a highway, the order must state that the special sessions were held within the "division in which the highway was situate."

An order of quarter sessions awarding the costs of such an indictment was held void, where the order of special sessions was defective in this respect, although in point of fact the special sessions, which directed the indictment, had been held in the proper division, and the order of quarter sessions recited that they had been so held.

The QUEEN v. MARTIN and another.

PASHLEY, in Trinity Term last, obtained a rule, calling upon the defendants, who were justices of the West Riding of Yorkshire, to shew cause why a mandamus should not issue, commanding them to issue a distress warrant to levy the costs of prosecuting a highway indictment, which had been tried at the West Riding Quarter Sessions.

The highway in question was situate in the township of Havercroft, within the division of Staincross, in the said riding. The surveyors of the highways of Havercroft had attended at a special sessions held within the division of Staincross, in obedience to a summons issued under stat. 5 & 6 Will. 4, c. 50, s. 94, which authorises a justice to issue a summons, "requiring the surveyor of the parish, or other person or body politic or corporate, chargeable with such repairs, to appear before the justices at some special sessions for the highways in the said summons mentioned, *to be held within the division in which the said highway may be situate.*" The surveyors having denied the liability of the township to the repair of the highway, the special sessions had made an order, directing an indictment to be preferred under section 95, which enacts, "that if on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, &c., it shall then be lawful for such justices, and they are hereby required, to direct a bill of indictment to be preferred." On the trial of the indictment at the quarter sessions for the riding, the liability of the township was established. The quarter sessions then made an order for costs against the township under the same section. Payment having been refused, the defendants were then applied to for a distress warrant to levy the costs, but they declined to grant such warrant.

The order of quarter sessions ordering payment of costs

recited that the special sessions, by which the indictment had been directed, were held "within the division of Staincross, in which the said highway is situate;" but this was not stated in the order of special sessions.

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R. Hall, on shewing cause, now made this objection among others, that the quarter sessions had no jurisdiction to order costs, because the order of special sessions was bad, inasmuch as it did not state them to have been held within the division in which the highway was situate. He also contended that this defect could not be supplied by reference to the order of quarter sessions, as the last mentioned order merely said within the division in which the highway "is situate;" and, as the limits of divisions might be varied from time to time under stat. 6 & 7 Will. 4, c. 12, it therefore did not appear that the highway *was* situate within the same division when the order of special sessions was made. As to the last mentioned point, he referred to *Walton v. Parish of Chesterfield* (a).

Pashley contra, contended that the order of quarter sessions was sufficient, and alone to be looked to, and must be taken to be true; and that, with respect to the holding the special sessions in any particular division, the statute was merely directory.

LORD DENMAN C. J.—The objection must prevail. Every thing that is necessary to give jurisdiction must appear on the face of all the proceedings. It does not appear in this case that the order directing an indictment was made by those who had jurisdiction.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

Rule discharged.

(a) 5 Mod. 322.

1843.

*Saturday,
Nov. 18th.*

Where a notice of appeal sufficiently identifies the order of removal appealed against by reference to its date and other particulars, the notice is not bad for omitting to give the names of the justices who made the order.

The QUEEN v. The Inhabitants of WEST HOUGHTON.

ON appeal to the Lancashire Quarter Sessions against an order for the removal of a pauper and his family from the township of Pennington to the township of West Houghton, both in the said county, the sessions confirmed the order, subject to a case.

It appeared from the case that the notice of appeal had been objected to at the trial on the following ground, that it "did not sufficiently point to the order appealed against, inasmuch as the names of the justices alleged to have made the order so appealed against were not inserted in the notice of appeal; that the names of such justices, if any there were, ought to have been inserted in such notice of appeal, and that the omission to do so by the appellants was a defect which prevented the Court from entertaining or trying the appeal."

In the notice of appeal the order of removal was fully described by date and other particulars; the only particular omitted was the names of the justices who made the order, the notice referring to them generally, as "two of her Majesty's justices of the peace in and for the county of Lancaster."

The question for the opinion of the Court was whether the notice of appeal was defective on the above ground. If the notice of appeal was not defective, then the case to be sent back to the sessions to be heard on the merits.

Baines in support of the order of sessions. [Lord Denman C. J. The objection to the notice of appeal seems about as good an objection as that the notice does not state in what mill the paper was made on which the order is written.]

Wortley contra was not heard.

Per CURIAM (a)—

Case to be reheard (b).

(a) Lord Denman C. J., Patterson, Williams and Coleridge Js.

(b) As to the practice of stating

a case, so that a rehearing by the sessions is necessary, see *Reg. v. Stoke-upon-Trent*, ante, 357.

1843.

*Saturday,
Nov. 25th.*

WILLIAMSON v. TAYLOR and others.

ASSUMPSIT. The declaration stated that on the 18th March, 1843, the defendants, then being owners of a certain colliery called Holywell Colliery, hired and retained the plaintiff; and the plaintiff, at the request of the defendants, then hired himself to the defendants as their servant for a certain term, to wit, from the 5th April in the year aforesaid, until the 5th April, 1844, to work at and in the said colliery, that is to say, as a hewer, for wages to be paid to the plaintiff by the defendants once a fortnight, upon the usual and accustomed day in that behalf, according to the quantity of work to be done by the plaintiff, at and after certain rates and prices, and on certain terms, conditions and stipulations, and subject to and under certain penalties and forfeitures then, to wit, on the day and year first aforesaid, agreed upon between the plaintiff and the defendants; and, amongst other terms, "*that the plaintiff, at all times during the said term, when the pit of the said colliery should be laid off work, should continue the servant of the defendants*, so being such owners as aforesaid, and subject to their orders and directions, and liable to be employed by them at such work as they the defendants should see fit; and further, that the plaintiff should, when required (except when prevented by sickness or other sufficient unavoidable cause), do and perform a full day's work on each and every working day, or such quantity of work as should be fairly deemed equal to a day's work (not exceeding eight hours), and should not leave his work until such day's work or quantity of work should be fully performed or finished to the extent of his ability, and in default thereof that he the plaintiff should for every such default forfeit and pay to the said defendants the sum of 2s. 6d.; and, further, that the pit of the said colliery should commence coal work at such times in the morning as should be required to suit the trade."

By an agreement called a "pit bond" the owners of a coal pit retained and hired the plaintiff for a year; the plaintiff, "during all the times the pit shall be laid off work, to continue the servant of the said owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit," and at certain wages.

Held, that under this agreement the pit owners were not bound to employ the plaintiff for a reasonable number of working days during the year.

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And in consideration of the premises, and that the plaintiff then promised the defendants to enter into their service under and by virtue of the said hiring, and to serve and work for them as such their servant as aforesaid during the said term for the said wages, and according to the aforesaid terms, conditions and stipulations of the said hiring, and subject to and under the penalties and forfeitures in that behalf aforesaid, *the defendants then promised the plaintiff to retain and employ him as their servant*, and to afford him the opportunity of working and of earning wages as such servant during the said term, in pursuance of the said hiring, and subject to and under the penalties and forfeitures in that behalf aforesaid, *at reasonable times* in that behalf, *for a reasonable number of working days* in that behalf during the said term, and to pay him wages as in that behalf aforesaid.

And although the plaintiff afterwards and at the commencement of the said term, to wit, on the said 5th day of April, 1843, entered into the service of the defendants, who then and from thence hitherto have been and are owners of the said colliery, under and in pursuance of the said hiring, and always from that time until the commencing of this suit was and still is ready and willing to serve and work for the defendants during the said term, under and in pursuance of the said hiring, for the said wages and according to the aforesaid terms, conditions and stipulations of the said hiring, and subject to and under the penalties and forfeitures in that behalf aforesaid, of which the defendants during the said term, to wit, on the day and year last aforesaid, and always afterwards had notice, and then and during the said term, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, were requested by the plaintiff to employ him and to afford him the opportunity of working and earning wages as such servant as aforesaid, *at reasonable times* in that behalf, *for a reasonable number of working days* in that behalf, in pursuance of the said hiring and

according to the aforesaid terms, conditions and stipulations thereof, and subject to and under the penalties and forfeitures in that behalf aforesaid, yet the defendants disregarded their promise, and did not nor would, after the commencement of the said term, employ the plaintiff as their servant, or afford him the opportunity of working or earning wages as such servant during the said term at reasonable times in that behalf, or for a reasonable number of working days, in pursuance of the said hiring, but wholly neglected and refused so to do; and on divers days during the said term and before the commencement of this suit, to wit, on the 6th day of April, 1843, and divers, to wit, forty days between that day and the commencement of this suit, the same being reasonable working days and times in that behalf, wrongfully and unjustly refused to employ the plaintiff and to afford him the opportunity of working and earning wages, and in pursuance of the said hiring, whereby the plaintiff hath lost and been deprived of wages to a large amount, to wit, to the amount of 100*l.*, which he otherwise would and ought to have earned and obtained in and by working as such servant of the defendants under and in pursuance of the said hiring.

Pleas: 1. Non assumpsit.

2. That defendants did, after the commencement of the said term, to wit, on the 6th April, 1843, and thence continually on divers days and times afterwards, employ the plaintiff as their servant and afford him the opportunity of working and earning wages as such servant during the said term at reasonable times in that behalf, and for a reasonable number of working days during the said term, in pursuance of the said hiring. Conclusion to the country.

3. That the said forty days in the declaration in that behalf mentioned, upon which it is in the declaration alleged that the defendants refused to employ the plaintiff, and to afford him the opportunity of working and earning wages under and in pursuance of the said hiring, were not nor were nor was any or either of them reasonable working

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days or times, or a reasonable working day or time in that behalf, in manner and form as in the said declaration alleged. Conclusion to the country.

Issues on the above pleas.

The case was tried before *Wightman J.*, at the last Northumberland Assises. The plaintiff put in a special agreement, called a pit bond, between the defendants; "owners of Holywell Colliery, on the one part, and the several other persons whose names or marks are hereunto subscribed of the other part." The first clause was, "The said owners do hereby retain and hire the said several other parties hereto from the 5th day of April next ensuing until the 5th day of April, which will be in the year 1844, to hew, work, fill, drive and put coals, and do such other work as may be necessary for carrying on the said colliery, as they shall be required or directed to do by the said owners," &c. The other material clauses of the agreement are set out in the declaration.

Evidence was given to shew that on several days during the stipulated term of service the pit was not worked, and that on those days the plaintiff had not obtained any employment or wages from the defendants; there was conflicting evidence upon the question, whether on those occasions the defendants, in consequence of the depreciated state of trade, could have kept the pit open except at a loss. The jury found a verdict for the plaintiff on the last two issues; and on the first issue the learned judge directed a verdict for the defendants, on the ground that the agreement did not support the promise laid in the declaration, viz. that the defendants promised to employ the plaintiff "at reasonable times for a reasonable number of working days, during the term, and to pay him wages." Verdict for the defendants on the first issue, with leave to move to enter a verdict for the plaintiff.

Granger, on the first day of this term, moved accordingly (a). The jury have found that the defendants refused

(a) Before Lord Denman C.J., *Williams*, *Coleridge* and *Wightman Js.*

to employ the plaintiff on reasonable working days; there has therefore been a breach of their agreement, unless it is to be construed as unilateral. The Court will not so construe an agreement of this sort, for the effect of such construction will be, that the workmen may be deprived of the means of subsistence, as they may be prevented from getting work elsewhere, and will have no right to require it from the pit-owner.

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Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—In this case the question is, whether, upon a true construction of the agreement, the defendants were bound to keep the pit at work so as to give the plaintiff an opportunity of working and earning wages. We do not find any thing in the terms of it to make it imperative on the defendants to keep the pit at work any given time, or to find the plaintiff in employment all the year round. It may be that such a stipulation was omitted, as it would be generally thought that the interest the defendants had in keeping the pit at work would be a sufficient protection to the workmen in that respect. We must however construe the agreement according to its express terms, and we think that the promise laid in the declaration is not supported. There is no ground therefore for entering the verdict for the plaintiff on the first issue. We had little doubt on this case when the rule was moved for, but we took time to look into the agreement, the question being of importance to a great number of persons.

Rule refused.



1843.

The QUEEN v. The Inhabitants of ST. LAWRENCE,
APPLEBY (a).

Under stat. 6
Geo. 4, c. 57,
a settlement
may be gained
by the joint
renting of
land.

ON appeal to the Westmoreland Quarter Sessions against an order for the removal of the widow of *George Liddel* and her children from the township of Pollard's Lands, in the county of Durham, to the parish of St. Lawrence, Appleby, in the county of Westmoreland, the sessions confirmed the order, subject to a case.

The case stated that in February, 1829, one *Spence* and the pauper's husband had taken a lease of a farm, situate in the appellant parish, and consisting of a separate and distinct dwelling-house and about seventy acres of land, for a term of three years, and that they occupied jointly for the whole of that term; that the land, independently of the dwelling-house, was worth 60*l.* a year; and that the pauper's husband, in each year of the term, paid his proportion of the rent for it, independently of the dwelling-house, to the amount of 30*l.*

The question for the opinion of this Court was, whether or not the pauper's husband gained a settlement in the appellant parish under the renting and occupation mentioned. If he did, the order of sessions to be confirmed, and to be quashed if he did not.

W. H. Watson appeared to support the order of sessions.

Archbold was called upon contra. The case turns upon stat. 6 *Geo.* 4, c. 57, s. 2, which enacts "that no person shall acquire a settlement, &c. by renting any tenement, &c. unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bonâ fide rented by such person, &c. at and for the sum of 10*l.* a year at the least for the term of one whole year; nor

(a) Decided in Hilary Term, 1845 (Jan. 25).

unless such house, building, or land shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid for the term of one whole year at the least." The words "separate and distinct" are to be applied to "land" as well as to "dwelling-house or building." No settlement therefore was gained by the joint renting in this case. The statute will be so construed as to extend the remedy to the mischief, which was the "disputes and controversies" on the subject of settlement by renting tenements, as appears from stat. 59 *Geo.* 3, c. 50, where the words "separate and distinct" were first introduced (a). Now the mischief of litigation is equally great, whether the tenement in respect of which the settlement is claimed consists of a building, or of land, or of both. He then referred to authorities laying down the principles of construction in the case of remedial acts, and particularly to *Rex v. Threlkeld* (b), as an instance of such construction.

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LORD DENMAN C. J.—The legislature appear to me studiously to have avoided doing that which they are supposed to have done. I think a settlement has been gained in this case.

PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

Order of Sessions confirmed.

(a) In stat. 59 *Geo.* 3, the words "separate and distinct" seem to be even more completely disconnected from the word "land" than in the later statute, for the words in the former statute are, "unless such tenement shall consist of a house or building, being a separate house or building, or of land, or of both," &c.

(b) 4 B. & Ad. 229.



1843.

Saturday,
Nov. 25th.

Where a person who resided in Maidstone, and was in the constant practice of resorting to Peel's Coffee House, London, was served at the coffee house with the copy of a writ of summons, describing him "of Sandling, near Maidstone, in the county of Kent, but to be heard of at Peel's Coffee House, Fleet Street, in the city of London," the Court set aside the copy and service, on the ground that the defendant's residence was misdescribed.

SIMPSON v. RAMSAY.

GRAY, on a former day in this term, obtained a rule nisi to set aside the copy and service of the writ of summons in this case, on the ground of misdescription of the defendant's residence.

The copy of the writ described the defendant as "of Sandling, near Maidstone, in the county of Kent, but to be heard of at Peel's Coffee House, Fleet Street, in the city of London." The præcipe was filed with the præcipes of the city of London.

The affidavit in support of the rule stated that the defendant lived at 39, Brewer Street, Maidstone, and not at Sandling, near Maidstone, nor at Peel's Coffee House.

The affidavits in answer stated that the defendant was in the constant habit of resorting to Peel's Coffee House; that he was seen there on the occasion of the service of the writ, and was actually served near to the coffee house.

Humfrey shewed cause.

Gray contra was not heard.

Per CURIAM (a)—

Rule absolute.

(a) Lord Denman C. J., Williams, Coleridge and Wightman Js.

END OF MICHAELMAS TERM.

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MICHAELMAS VACATION.

WEST LONDON RAILWAY COMPANY v. BERNARD.

Tuesday,
Nov. 28th.

DEBT for money due on calls on railway shares. The declaration alleged that the defendant *subscribed* for ten shares of 20*l.* each in the Birmingham, Bristol and Thames Junction Railway (incorporated under 6 *Will.* 4, c. lxxix., local and personal, which is amended by 3 & 4 *Vict.* c. cv., local and personal, by which the name is changed to the West London Railway). That, whilst the defendant was entitled to the ten shares aforesaid, the directors made certain calls "from the several subscribers to and proprietors of the said undertaking for the time being, upon and in respect of their respective shares." The declaration then averred, that the calls were made in conformity with the provisions of the acts of parliament. That eight such calls were made. That more than twenty-one days before the calls became and were respectively due and payable, notice was given as required by the act. Whereby the defendant became liable to pay the company a certain large sum, to wit, the sum of 190*l.*, being the amount of the said several calls. Breach: non-payment of the whole or any part.

By sect. 125 of the Birmingham, Bristol and Thames Junction Railway Act, 6 *Will.* 4, c. lxxix., the company are directed to cause the names of persons entitled, or who may thereafter be entitled to shares, to be entered in a book, and a certificate to be delivered to *every such proprietor* on demand.

By sect. 129, parties, who have subscribed, or shall hereafter subscribe, towards the said

undertaking, are required to pay the sums of money, or such proportions, &c. as shall be called for by the directors. By sect. 130, the directors have power to make calls of money "from the subscribers to and proprietors of the said undertaking;" "and if any owner or proprietor of any such share shall neglect or refuse to pay such his rateable proportion," the company may sue him; and the directors are authorised to declare the shares belonging to such owner forfeited.

Held, that in sect. 130 the words subscribers, owners and proprietors are used indiscriminately, so that a party who had originally subscribed, but had never been registered or received his certificate, was liable, in an action of debt charging him as a subscriber, "on calls made from the several subscribers to and proprietors of the said undertaking," the calls appearing in evidence, to have been made upon the proprietors.

By sect. 118, proceedings of meetings are to be entered into a book, "and shall be signed by the chairman of such respective meetings:"—*Held*, that a minute of a proceeding, entered at a subsequent meeting, with the words "read and confirmed," to which was attached the signature of the chairman of the prior meeting, was sufficiently signed within the meaning of the section.

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Pleas: 1. Never indebted.

2. Denying that the defendant subscribed.

3. Denying that the defendant was, at the time of the making of either of the said calls, entitled to the shares in the declaration mentioned, or either of them.

4. Denying that the defendant was, at the time of the making of either of the said calls, *owner* or *proprietor* of the said shares, or any or either of them. (To this plea there was a special demurrer, on which judgment was ultimately given for the plaintiffs, on the ground that it did not traverse any of the allegations in the declaration, and therefore concluded wrongly to the country.)

5. That after the defendant had subscribed, and before any registration of proprietors under the act of parliament, the defendant, with the knowledge and consent of the company, had transferred his interest in the shares, and thereby ceased to be a proprietor, or to have any interest. Verification.

6. That before the making of either of the said calls, and after the defendant's subscription and passing of the act, the first general meeting of the company was held, at which meeting a register of the persons then entitled to shares was duly made according to the act. That at the time of making such register, the defendant was not an owner, proprietor or party entitled to any share, nor was then registered as such, nor has since subscribed or become an owner or proprietor. Verification.

7. Denying that the calls were made as in the declaration mentioned.

8. Denying that notice was given of the calls modo et formâ.

The replication joined issue on pleas 1, 2, 3, 7 and 8, and traversed 5.

Replication to 6th plea, that after defendant had subscribed, and before the making of the calls, the company were always ready and willing to cause to be registered the several persons who became entitled to shares, and did cause to be registered such persons as were ready and

willing, &c. That the defendant, during the whole time aforesaid, and whilst he was and continued to be such subscriber as aforesaid, did not tender or offer or present himself, &c. to be registered, but neglected and refused to do so, and prevented and hindered the company from registering him; with this, that the defendant was, at the time of making and sealing of the said register in the 6th plea mentioned, entitled to the said shares in the said undertaking modo et formâ.

The cause was tried before Lord Abinger C. B., at the Guildford Summer Assizes, 1842.

The defendant was an original subscriber, and the calls were on ten shares, for which he subscribed, previously to the passing of the first act, by signing the parliamentary contract and paying the deposit.

By section 1 of the act, the persons therein named, "and all other persons and corporations who have subscribed or shall hereafter subscribe towards the said undertaking," their several and respective successors, executors, &c. are united into a company and incorporated. By section 3, the sum raised is to be divided into shares, "and the said shares shall be and are hereby vested in the several parties taking the same, and their several and respective successors, executors," &c. "And every person and corporation, and their several and respective successors, &c. who have subscribed or shall severally subscribe for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof," shall be entitled to receive in proportionable parts the profits, &c.

By section 125, it is enacted, that the company shall, at the first or some subsequent general meeting, and afterwards from time to time as occasion may require, cause the names of the several corporations, and the names and additions of the several persons, who shall be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the sub-

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scriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and, after such entry made, to cause the common seal to be affixed thereto; and the said company shall from time to time cause a certificate or ticket, with the common seal of the said company affixed thereto, to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said company the sum of 2s. 6d. and no more, for any such certificate or ticket; and such certificate or ticket shall be admitted in all courts whatever as *prima facie* evidence of the title of such respective proprietors, their successors, executors, &c. to the share or shares therein specified; but the want of such certificate or ticket shall not hinder or prevent the *proprietor* of any of the said shares from selling or disposing of them." (Then follows the form of the certificate.)

It appeared that the name of the defendant had never been registered in the manner prescribed by this section, he never having brought in his scrip to be exchanged for shares.

The calls were proved by the minute book of the company. The first was in the following form:

"18th August, 1836.—Resolved, that a call of 2l. per share be made *upon the proprietors* of the company, to be paid to the respective bankers of this company on or before Saturday, the 15th October next, and that the secretary prepare an advertisement and send a circular letter to each *proprietor*." Memorandum at foot, "On the 24th August the minutes of the meeting of the 18th August have been read and confirmed." This was signed by Mr. Q. (who was chairman at both meetings). The following was the advertisement of the call:

"Birmingham, Bristol and Thames Junction Railway Company. Call of 2l. per share. The directors of the company having resolved to call, under the powers of their

act of incorporation, for an instalment of 2*l.* per share, notice is hereby given, that the *holders of certificates* are required to pay on or before the 15th October next, to any of the following bankers (naming them), the sum of 2*l.* on each of their respective shares."

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The other resolutions for calls were in the following form:—"Resolved, that a call of —*l.* per share be made upon the *proprietors*." They were similarly signed; and the notice by advertisement was also to the *proprietors*.

At the trial it was objected, 1. That these resolutions were not properly authenticated, the act requiring (sect. 118) that the proceedings at all meetings shall be entered in some book, "and signed by the chairman of such respective meetings." In the present instance, at the foot of the entry of these minutes, in each instance, was the following memorandum:—"On the (day of a subsequent meeting) the minutes of the meeting of the (day on which the resolution was made) read and confirmed;" and then followed the signature of the chairman, who was also chairman of the meeting at which the resolution passed. The learned judge overruled the objection and received the book in evidence.

It was lastly objected on the part of the defendant, that this evidence went only to shew a call made on proprietors and holders of certificates, under the provisions of section 130 of the act: that the defendant was neither, but an original subscriber, who had never been registered, and therefore did not come within that description; that, in order to affect him, the call should have been made under section 129.

The following are the provisions of the two sections in question. By section 129, the "several parties who have *subscribed*, or who shall hereafter *subscribe* for and towards the said undertaking, shall, and they are hereby required to, pay the said sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said com-

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pany, under and by virtue of the powers of this act, at such times, and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said company to sue for and recover the same, with full costs of suit, in any courts of law or equity, together with interest," &c.

Sect. 130. "That the directors shall have power from time to time to make such calls of money *from the subscribers to and proprietors of* the said undertaking for the time being, to defray expenses, and as they shall find necessary; so that the aggregate amount of calls shall not exceed 20*l.*, and no single call exceed 5*l.*, &c., and the respective *owners* of shares in the said undertaking shall pay their rateable proportion, &c., to such persons, and at such times and places, and in such manner, as shall be appointed as aforesaid: and if any *owner or proprietor* for the time being of any such share shall not pay such his rateable proportion, he shall pay interest, &c., and if any *owner or proprietor* for the time being of any such share, shall neglect or refuse to pay such his rateable proportion, together with interest, if any, it shall be lawful for the said company to sue for and recover the same in any of his Majesty's courts of record, by action of debt, or on the case, or by bill, suit, or information, or the said directors may declare the shares belonging to such *owner* to be forfeited, and to order such shares to be sold."

Verdict for the plaintiffs.

In the following term, *Bompas* Serjt. obtained a rule to shew cause why the verdict should not be entered for the defendant on the last point, or for a new trial, on account of the reception of illegal evidence.

Thesiger and *E. James* now shewed cause (a). The words "subscribers," "owners," "proprietors," are clearly used in the act as synonymous. It cannot be contended

(a) Nov. 28, before Lord Denman C. J., *Williams, Coleridge* and *Wightman* Js.

that it was really the intention of the legislature to make any distinction between them in respect of calls or liabilities. The point has been in fact already decided, on the clauses of a similar act, in the *London Grand Junction Railway Company v. Freeman* (a), where it is said by the Court, "we cannot suppose parliament to have been ignorant of the manner in which the subscriptions had been made, and the transfer of shares negotiated: and, if the intention was to allow none to be proprietors but such as had been originally subscribers, it could not have failed to appear distinctly. Instead of this, the various clauses already quoted shew the most lax employment of all the phrases, by which property in the undertaking could be described, out of the most popular vocabulary. These expressions are not designedly varied according to the matter of the respective clauses, but arbitrarily used as all having the same import." Expressions to the same effect are thrown out by *Parke B.* and *Alderson B.* in *The Great North of England Company v. Biddulph* (b), where it was necessary to decide the point. Section 104, which regulates the mode of voting, affords an argument to the same effect. "All persons who shall have *duly subscribed* for or *become entitled* to shares," are to vote; and it is then added, that votes may be given by proxies constituted "under the hands of the *proprietors* appointing such proxies:" and questions are to be determined by the majority of votes "of the *proprietors*:" the proprietors are therefore clearly treated as comprehending the *subscribers*.

2. The question as to the sufficiency of the signature of the chairman has been decided (since this rule was moved for) in *Miles v. Bough* (c), and *Southampton Dock Company v. Richards* (d).

Bompas Serjt. and *Channell* Serjt. contrà. It is not sought

(a) 2 M. & G. 639.

(c) 3 Q. B. 845; S. C. 3 G. &

(b) 2 Railway Cases, 416, 417. D. 119.

(d) 1 M. & G. 448.

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by this motion to impugn the authority of the *London Grand Junction Railway Company v. Freeman (a)*, nor is it contended that the words "subscribers" and "proprietors" may not be used interchangeably for many purposes, for instance, where the right of voting is conferred. But it is maintained, that the act recognises two classes of proprietors, namely subscribers, and registered owners of shares: and that a different form of call and different mode of proceeding are given in the case of these classes respectively by sections 129 and 130. Here the form of call and form of advertisement are specially directed to the case of registered owners: and such an advertisement conveyed no legal notice whatever to a mere subscriber. The defendant is therefore entitled to succeed at all events on the plea denying that any call was made as in the declaration mentioned, viz. on proprietors and subscribers; and also on the plea denying the notice. 2. *Miles v. Bough (b)* is not decisive of the present case. There the chairman signed indeed at a time subsequent to the meeting, but then he signed the proceedings: here he only signs a subsequent ratification of them.

Lord DENMAN C. J.—I think the first point is substantially decided by the *London Grand Junction Railway Company v. Freeman (a)*. In that case the Court had occasion to look into the several sections of another of the ordinary railway acts, and came to the conclusion that the words "subscribers," "owners," and "proprietors," were used indiscriminately to point out the same set of persons. Sections 129 and 130 do not, as contended, make a distinction between subscribers and other proprietors: they are all equally liable to contribute, to be called upon, and to actions if they do not pay. As to the second, I think *Miles v. Bough (b)* is clearly in point. The resolutions have the chairman's signature: that was held sufficient in *Miles v. Bough (b)* whenever appended: the entry of the

(a) 2 M. & G. 639.

(b) 3 Q. B. 845; S. C. 3 G. & D. 119.

word "confirmed" does not make it less the chairman's signature.

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PATTESON J.—This declaration does not follow the form given by section 132 of the act, viz. that "in any action, brought by the company against any proprietor for the time being of any share, it shall be sufficient for the said company to declare and allege that the defendant *being a proprietor of a share,*" is indebted, &c. It is a declaration at common law, charging him as having subscribed to the undertaking, as in fact he did. And the question reduces itself to this, whether, as such subscriber, he was liable on calls addressed to the "proprietors" and notice to the same. This depends on section 130. And I think the point is decided by the interpretation put in the *London Grand Junction Railway Company v. Freeman* (a) on similar sections. No doubt it is singularly worded. First, the directors are empowered to make calls on "subscribers and proprietors;" next, if any "owner or proprietor" refuse to pay, the company may sue him: or the directors may declare the shares of such "owner" forfeited. The only conclusion I can draw from words thus used, is that they were all intended to designate the same persons, and that the original "subscribers" are bound to pay on calls addressed to "proprietors." As to the other point, that the signature of the chairman is only to a confirmation, not to the proceedings themselves, I think there is nothing in it.

WILLIAMS J.—I concur as to the first point. As to the second also, I cannot satisfactorily distinguish this case from *Miles v. Bough* (b).

COLERIDGE J.—The act appears to me so framed that no interpretation is free from objection: but the least objectionable is that which regards the words as used indiscriminately. As to the other objection, no doubt the

(a) 2 M. & G. 639.

(b) 3 Q. B. 845; 3 C. & D. 119.

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introduction of the word "confirmed" introduces a slight distinction in fact between this case and *Miles v. Bough*(a): but is there any distinction in principle? It was there decided that a signature at a subsequent meeting is sufficient, when the chairman signs as having been chairman of the former. I do not see that it makes any difference that an entry is added, that the resolutions were "confirmed."

Rule discharged.

(a) 3 Q. B. 845; S. C. 3 G. & D. 119.

Monday,
Nov. 27.

WHEELER v. BRANSCOMBE.

Where the lessor of premises at a rent payable quarterly had given a written authority to a mortgagee to receive rent from the lessee, and the mortgagee had given notice to the lessee to pay such rent to no one but him, and the lessee had paid the mortgagee such rent from time to time, and there was still an arrear of interest due from the lessor on the mortgage,

Held, that these facts furnished no defence, under non tenuit and riens in arrear, pleaded by the lessee to an avowry of the lessor in respect of a quarter's rent which the lessee had not paid to any one.

REPLEVIN for distraining goods and chattels in a dwelling-house at Torquay, occupied by the plaintiff.

Avowry by the defendant, that the plaintiff was tenant to the defendant of the premises in question, at a yearly rent of 21*l.*, payable quarterly, and that a quarter of a year's rent, ending September 29, 1841, was in arrear.

Pleas to the avowry, non tenuit, and riens in arrear.

At the trial before *Wightman J.* at the Devon Summer Assizes, 1842, it appeared that the plaintiff had taken the house of the defendant under a written agreement at the rent and on the terms stated in the avowry, on March 27th, 1838. Previously to the commencement of the tenancy, the defendant had mortgaged the premises to a Mr. *Hawkins*. During the year 1840, the interest being in arrear, *Hawkins* gave the defendant notice to pay off the mortgage; and, the notice having expired, the defendant, in order to prevent the sale of the premises, gave *Hawkins* the following authority to receive the rents.

Torquay, March 25th, 1840.

I hereby authorise Mr. *J. Hawkins* to receive the rents quarterly, or at any other time or times that he may think

pleaded by the lessee to an avowry of the lessor in respect of a quarter's rent which the lessee had not paid to any one.

proper, of Mr. *Wheeler* and Mr. *Eardley*, for the two houses that they now occupy, belonging to me, situate in Braddon's Row, Torquay.

W. Branscombe.

(Mr. *Eardley* was tenant of another house of the defendant's.)

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On receiving this authority, *Hawkins* gave the plaintiff a written notice not to pay any rent except to him or his order. *Hawkins* continued in receipt of the rents quarterly until Midsummer, 1841, inclusive. At Michaelmas, 1841, the defendant distrained for a quarter's rent, which was then unpaid. The plaintiff replevied. Evidence was given on the part of the plaintiff, that there was still an arrear of interest due on the mortgage when this distress was taken. The learned judge doubted whether these facts furnished any answer to the avowry on the pleadings; but left it to the jury to say whether or not there was any interest due to *Hawkins* at the time of the distress, and the jury being of that opinion, a verdict passed for the plaintiff with 4*l.* 4*s.* damages, with leave to move to set it aside, and enter it for the defendant.

Crowder and *Greenwood* now shewed cause. The plaintiff proved the authority to *Hawkins*, and notice to himself of that authority. It was irrevocable, being an authority coupled with an interest. If, then, the plaintiff was bound by this authority, and to pay *Hawkins* when called upon, he might plead *riens in arrear* as regarded *Branscombe*: *Dyer v. Bowley* (a). [*Wightman J.* 'There was no rent unpaid in that case; the question was, whether the payment to a mortgagee was sufficient for the purpose of the plea, or not. Here there is a quarter unpaid. It seems to me, the question, if any, arises on non tenuit.'] The plaintiff cannot contend, under these circumstances, that the defendant was not his landlord. But, if the landlord authorises another to receive his rent, then a quarter unpaid is not in arrear to him. Payment to a mortgagee may be specially pleaded: *Johnson v. Jones* (b), and the

(a) 2 Bingham. 94.

(b) 9 A. & E. 809; S. C. 1 P. & D. 651.

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plea seems to be there considered as equivalent to *riens in arrear*. The real meaning of that plea must be taken to be, not, necessarily, that the sum in question has been paid to some one, but that as between the landlord and tenant the demand is extinguished. If a debtor is under a binding engagement to pay the debt over to a third person, that, as between him and the original creditor, is equivalent to an extinguishment of the debt, or payment: *Crowfoot v. Gurney* (a); *Hodgson v. Anderson* (b); *Hawkins* might have maintained an action against the plaintiff for this money: *Gaussen v. Morton* (c); *Watson v. King* (d); *Wilson v. Coupland* (e); *Wharton v. Walker* (f); *Barron v. Husband* (g). "Suppose *A.* owes *B.* 100*l.*, and *B.* owes *C.* 100*l.*, and the three meet, and it is agreed between them that *A.* shall pay *C.* the 100*l.*: *B.*'s debt is extinguished, and *C.* may recover that sum against *A.*:" *Buller J.* in *Tatlock v. Harris* (h).

Bompas Serjt. contrà, cited *Evans v. Elliott* (i). (He was stopped by the Court.)

LORD DENMAN C. J.—Unquestionably the tenant is placed in circumstances of some difficulty. He is called on to elect between two apparently conflicting authorities. But *Hawkins* is merely a party clothed with an authority to receive the rents from time to time, under particular circumstances: he is not *Wheeler's* landlord; the plea of *non tenuit*, therefore, will not avail the plaintiff, and was properly abandoned in argument. But neither will the plea of *riens in arrear*. There may be engagements entered into between the several parties, which would

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| (a) 9 Bingham. 372. | (f) 4 B. & C. 163; S. C. 6 D. |
| (b) 3 B. & C. 842; S. C. 5 D. | & R. 288. |
| & R. 735. | (g) 4 B. & Ad. 611; S. C. 1 N. |
| (c) 10 B. & C. 731. | & M. 728. |
| (d) 4 Camp. 272. | (h) 3 T. R. 180. |
| (e) 5 B. & Ald. 228. | (i) 9 Ad. & El. 342; S. C. 1 P. |
| | & D. 256. |

have the effect of releasing the tenant from his liability to his landlord, until the accomplishment of a certain event; but then they should be made the matter of a distinct defence. The money may be due to *Hawkins*, not to the defendant, but it cannot be said the payment is not in arrear.

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WILLIAMS J.—It seems to me that if the plaintiff could have made out any case, it must have been under non tenuit: but for that purpose the evidence is insufficient.

COLERIDGE J.—The intention of the parties was, not to dispose of the reversion to *Hawkins*, but to allow *Hawkins* to receive the rent while the interest on his mortgage was in arrear. That authority might, no doubt, be so coupled with an interest as to make it irrevocable by the defendant. But assuming this, and admitting to the fullest extent the correctness of the argument, such a defence does not arise on non tenuit, or riens in arrear. The defence is, not that the rent is not in arrear, but that the plaintiff is bound to pay the arrear to a third party.

WIGHTMAN J.—If the plaintiff had paid *Hawkins* this particular quarter, I do not say but that the case might have been within some of the authorities cited, and that there might have been nothing in arrear as against the landlord. It might have been a virtual payment to him. I agree also that this authority might have been irrevocable. But the distinction is, that in the present case the money has been paid to no one.

Rule absolute.



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Saturday,
Dec. 9th.

HARTLEY and another v. MANTON.

Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the defendant and S. carried on business at London under the style of the firm of M. and S., and also at Rio de Janeiro under the style of the firm of S. and M., that the defendant carried on the business of the firm in England, and S. at Rio. That the bill was drawn by S. in the name of the firm of S. and M., for a debt due by S. and M. to the plaintiff, and accepted by defendant in the name of the firm of M. & S. That after the bill was made and indorsed, and before the acceptance, the firm of S. and M. at Rio having become insolvent, the plaintiff and the other creditors of S. and M. entered into an agreement with S. and M. at Rio, by which it was stipulated, among other things, that the holders of bills drawn by S. and M. on M. and S., should be considered as creditors for cash paid, but the respective dividends should be deposited in a bank at Rio until presentation of protests of their bills not having been paid, but, the payment in London being verified, the respective sums so deposited should be divided among the creditors: which agreement was in course of being acted upon. That defendant accepted the bill in ignorance of this agreement. That the proceedings were according to the law of Brazil, and constituted, according to that law, a discharge of the debt. Replication de injuriâ to this plea held bad, on the ground that the plea is in discharge, not in excuse. Held, also, that the plea is bad, as not shewing any sufficient discharge of the London house from accepting the bill, or release from paying it.

ASSUMPSIT. The first count was on a bill of exchange, drawn by certain persons under the style and description of "*Steele and Manton*," on the 17th of January, 1842, in parts beyond the seas, to wit, at Rio de Janeiro, for 359*l.* 6*s.* 9*d.*, on the defendant, payable to order of plaintiffs at sixty days' sight. It averred acceptance by defendant, and indorsement by *Steele and Manton* to the plaintiffs; second count, for 500*l.* on an account stated.

Plea, as to the first count, and also as to the sum of 359*l.* 6*s.* 9*d.*, parcel of the monies in the second count mentioned, that the said sum of 359*l.* 6*s.* 9*d.*, parcel, &c., so found to be due to the said plaintiffs on an account stated, as in the last count mentioned, is the sum of 359*l.* 6*s.* 9*d.* specified in the said bill of exchange in the said first count mentioned; and that the said two sums of 359*l.* 6*s.* 9*d.*, are one and the same debt, and not other and different debts of 359*l.* 6*s.* 9*d.*; and the said bill of exchange in the said first count mentioned was accepted by the said defendant as in that count mentioned for and on account and in respect of the said sum of 359*l.* 6*s.* 9*d.*, parcel of the aforesaid monies in the said last count mentioned; that, before and at the time of the making of the said promise in the said last count mentioned, as to the said sum of 359*l.* 6*s.* 9*d.*, parcel, &c., and before and at the time of the making of the said bill of exchange in the said first

count mentioned, as to the said sum of 359*l.* 6*s.* 9*d.*, parcel, &c., and before and at the time of the making of the said bill of exchange in the said first

count mentioned, and before and at the time of the making of the agreements hereinafter in this plea mentioned, the said defendant and one *Andrew Steele* were merchants and co-partners in trade, carrying on their business as such merchants and traders in co-partnership together, to wit, at London, and also in certain parts beyond the seas, to wit, at Rio de Janeiro, in the empire of the Brazils. And the said defendant, and the said *Andrew Steele*, before and at the times aforesaid carried on their said trade and business at London aforesaid, as such traders and merchants, by and under the name, style, and firm of *Manton, Steele & Co.*, and at Rio de Janeiro under the name and style of *Steele & Manton*. That before and at the time, &c., and also before and at the time of the accepting the bill, the defendant resided and was in England, and carried on the business of the firm, while *A. Steele* resided and carried on the business at Rio; that the bill was made and indorsed in parts beyond the seas, to wit, at Rio aforesaid, by the said *A. Steele* as such co-partner, and in the name of the firm, for and on account of a certain debt, to wit, the sum of 359*l.* 6*s.* 9*d.*, at the time of its making due to the plaintiffs from the defendant and *Steele* jointly, and incurred by them at Rio in the name of the firm; and that there was no other consideration for the bill; and that the bill was directed to the said defendant by being directed to the said firm of *Manton, Steele & Co.*, and not otherwise, and accepted by the defendant under the same name; and the account stated, as to 359*l.* 6*s.* 9*d.*, was in respect of the same debt, and not otherwise. That after the alleged promise in the second count, and the making and indorsing of the bill, and while the debt was owing, to wit, on the 11th of March 1842, the said *A. Steele* being then resident at Rio, and subject to the laws of the empire of the Brazils, the said defendant and *Steele*, under the name of *Steele & Manton*, were indebted to the plaintiffs in the said sum of 359*l.* 6*s.* 9*d.*, and also to divers other persons respectively resident at Rio in divers large sums of

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money, and were in embarrassed circumstances, and unable to meet their engagements, and it was doubtful whether they would be able to pay their debts in full; of which the plaintiffs and the said other creditors had notice. That afterwards, to wit, on the same day and year last aforesaid, to wit, at Rio, &c., and before the acceptance, the said plaintiffs, and the said creditors at Rio of the house of *Steele & Manton*, made the following agreement signed by the said plaintiffs and the said other creditors, according to the laws of Brazil. The plea then set out the agreement. It recited that the list of debts to the firm amounted to 22,350*l.*, that of debts due by the firm to 14,210*l.*, including the sum of 8,350*l.* for bills drawn by *Steele & Manton* on the London house of *Manton, Steele & Co.*, the payment or non-payment of which was then unknown; and that the failure of the firm was proved not to have arisen from any fault on their part, but from unforeseen circumstances, &c. The following were then the material portions of the agreement; that the liquidation of the debts of the said firm of *Steele & Manton* should be forthwith commenced and continued until the claims of the creditors were either paid in full, or liquidated to the extent of the assets of the firm; the liquidation to be conducted by *A. Steele*, under conditions therein specified; that the liquidation should be made with the least possible delay, and a dividend paid as soon as 3*l.* per cent. could be obtained, &c.; that *the holders of bills drawn by Steele and Manton on the London house of Manton, Steele & Co., should be considered as creditors for cash paid*, but the respective dividends should be deposited in the Commercial Bank until presentation of protests of their bills not having been paid, but, the payment in London being verified, those respective sums so deposited should be divided among the creditors; that, in case of the creditors being paid in full, the liquidation should cease, and the parties be at liberty to resume business, &c. The plaintiffs and other creditors executed and gave powers to *A. Steele*, and other persons named, to

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represent them in and out of court, &c. That afterwards, &c., to wit, &c., at Rio de Janeiro aforesaid, in the empire of the Brazils aforesaid, and whilst the said *A. Steele* was resident there as aforesaid, and subject to the laws of the said empire, and before the said acceptance by the said defendant of the said bill in the said first count mentioned, the said *A. Steele*, for and on behalf of the said defendant and himself the said *A. Steele*, by and under the name, style and firm of *Steele & Manton*, did then agree to and with the said plaintiff, and the said other creditors of the said firm of *Steele & Manton*, at Rio de Janeiro aforesaid, according to the said laws of the said empire of Brazil, and the said plaintiffs and the said other creditors did then and there mutually agree with each other and with the said defendant, and the said *A. Steele*, according to the said last mentioned laws, that the liquidation and payments of the said debts so due to the said plaintiff and the said other creditors by the said defendant and the said *A. Steele*, by and under the name, style and firm of *Steele & Manton*, at Rio de Janeiro aforesaid, should thenceforth commence and be continued and conducted, and the said agreement and deliberation hereinbefore mentioned of the said plaintiffs and the said other creditors at Rio de Janeiro aforesaid should in all things be observed, performed and executed, according to the terms and provisions of the same agreement and deliberation, and in manner thereby provided. That the said firm of *Steele & Manton*, by the said *A. Steele*, did then proceed to realise and convert into money the whole of the said property, rights, estate and effects of the said firm of *Steele & Manton*; and from thence until the commencement of this suit were and still are proceeding with the realisation and conversion into money thereof, for the purpose in the said agreement mentioned; and the same hath always been and is conducted by the said *A. Steele* according to the true intent and meaning of the said agreement. That defendant accepted the said bill of exchange in the said first count mentioned in London

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aforesaid, after the making of the said deliberation and agreement hereinbefore mentioned, and that, at the time when defendant accepted the said bill of exchange, he was resident in England, and was wholly unaware and in ignorance of the fact of the several premises hereinbefore mentioned to have taken place and been performed at Rio de Janeiro aforesaid. That all and singular the proceedings aforesaid at Rio de Janeiro were made and done pursuant to and according to the laws of the empire of the Brazils; and that, by and according to the force, form and effect of the said laws, the said deliberation and agreement and premises aforesaid were and are a full and absolute discharge and release of the said debt in respect of which the said bill of exchange was so indorsed as aforesaid; and the said defendant hath become, and was, before the commencement of this suit, absolutely discharged from the said cause of action in the said first count mentioned, and from the cause of action in the said last count as to the said sum of 359*l.* 6*s.* 9*d.*, parcel, &c., and this the defendant is ready to verify, &c.

Replication, as to the plea of the defendant by him first above pleaded as to the first count of the said declaration, and also as to the sum of 359*l.* 6*s.* 9*d.*, parcel of the monies in the said second count mentioned, that the defendant of his own wrong, and without the cause by him in his said first plea alleged, broke his said promise in the said first count of the said declaration, and also his said promise in the said second count in respect of the said sum of 359*l.* 6*s.* 9*d.*, parcel of the monies in the said second count mentioned, in manner and form as the plaintiffs have above thereof complained.

Special demurrer to the replication. Causes of demurrer, that the replication is bad for duplicity, because it is too large, and puts in issue all the several matters of defence alleged by the plea, instead of putting in issue some one material allegation contained therein; and because the replication purports to deny the excuse set up by the plea for the breach of the promises in the first count, and also in

the second count as to the said sum of 359*l.* 6*s.* 9*d.* mentioned; whereas no excuse for the breach of those promises is alleged or contained in the said first plea, but the same shews matters in discharge, which the said replication improperly puts in issue as matter of excuse; and also because the said replication to the said first plea assumes that all the material matters of that plea are merely in excuse, although those matters do not as pleaded appear, nor are by any matter alleged in the replication shewn, to be merely matters in excuse: and also for that the defendant, in and by his said first plea, has shewn and stated an authority from the plaintiffs to break his said promises in the introductory part thereof mentioned; and also for that the said replication is informal and inapplicable, according to the established rule of pleading, to the matter of defence contained in the said first plea, so far as the same contains matter in discharge. And also for that the said replication is in other respects informal and insufficient, &c.

Joinder in demurrer.

Cleasby for the defendants (a). The replication is bad, because the plea is in discharge, not in excuse: *Salter v. Purchell* in error (b), *Jones v. Senior* (c), *Crisp v. Griffith* (d). A plea in excuse, in an action on promises, is one which confesses the promise in point of fact, but shews some reason on account of which it never could have been enforced at law. A plea in discharge not only confesses the promise in point of fact, but confesses also the legal liability arising from it, and then shews that by matter subsequent the plaintiff had discharged the defendant from such liability. This plea is of the latter description, and affords on general demurrer a sufficient answer to the action:

(a) The case was argued in vacation after Trinity Term this year (June 17), before Lord Denman C. J., Patteson, Williams and Coleridge Js.

(b) 1 Q. B. 209; S. C. 1 G. & D. 693.

(c) 4 M. & W. 128; S. C. 6 D. P. C. 701.

(d) 2 Q. M. & R. 159; S. C. 3 Dowl. P. C. 752.

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Barnes v. Hunt (a). As pleaded to the second count, it sets up a good release of the debt; as pleaded to the first count, a good release of the consideration for the debt.

W. J. Alexander contra. The plea is a novel one; but it is modelled on that in *Jones v. Senior (b)*. But there it is averred that there was money paid in satisfaction. Here there is no such averment; it amounts only to an excuse for nonpayment, and is precisely within the mischief intended to be cured by allowing the replication *de injuriâ* in actions of *assumpsit*: see *Mr. Smith's note on Crogate's case (c)*. The plea sets up an agreement, under which the plaintiff, with other holders of bills drawn by the Rio house on the London house, was to be considered a creditor for cash paid, and to be reimbursed when the debts of the house were got in at Rio. There is nothing in the plea to shew that any advantage at all would result to the plaintiff from this agreement being carried into effect; all the debts due to the house at Rio might turn out bad: *Hemingway v. Hamilton (d)*, *Mitchell v. Cragg (e)*, *Scott v. Chapelow (f)*, *Isaac v. Farrar (g)*. If, therefore, this is an insufficient plea in discharge, to be good for anything, it must be a plea in excuse, and the replication is good: *Noel v. Rich (h)*, *Crisp v. Griffith (i)*. In *Reynolds v. Blackburn (k)*, the plea more resembled a plea in discharge than the present, yet it was held one in excuse: *Watson v. Wilkes (l)*. Nor is this replication bad on account of the pleas shewing any authority derived from the plaintiff: *Bowler v. Nicholson (m)*. It shews an agreement, which is something quite distinct from "authority, command, or licence:" *Tindal C. J.* in *Salter v. Purchell (n)*.

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| (a) 11 East, 451. | (i) 2 C. M. & R. 159. |
| (b) 4 M. & W. 123; S. C. 6 D. P. C. 701. | (k) 6 D. P. C. 19. |
| (c) 1 Smith's Leading Cases, 59. | (l) 5 B. & Ad. 237; S. C. 6 N. & M. 752. |
| (d) 4 M. & W. 115. | (m) 12 A. & E. 341; S. C. 4 P. & D. 16. |
| (e) 10 M. & W. 367. | (n) 1 Q. B. 219; S. C. 1 G. & D. 682. |
| (f) 2 Dowl. P. C. N. S. 78. | |
| (g) 1 M. & W. 65. | |
| (h) 2 C. M. & R. 360. | |

Cleasby, in reply, cited *Boothby v. Sowden* (a), *Good v. Cheeseman* (b), *Tatlock v. Smith* (c), and *Garrard v. Woolner* (d). The effect of the plea is to set up an arrangement between the original parties, after the right of action had become vested in the plaintiffs, which took away that right of action; it is therefore in discharge, and good, at all events, on general demurrer.

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Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action by the indorsees against the acceptor of a bill of exchange, and on an account stated. The plea states that the defendant and one *A. Steele* carried on business in London and at Rio de Janeiro; at the former place under the firm of *Manton, Steele & Co.*, at the latter under the firm of *Steele & Manton*; that *Steele & Manton* drew the bill in question on *Manton, Steele & Co.*, payable to their own order, and indorsed it to the plaintiffs for a bona fide debt, the subject matter of the account stated. That afterwards, and before the bill was accepted, *Steele & Manton* stopped payment, and made an arrangement with their creditors, plaintiffs being parties to it, the effect of which, according to the law at Rio de Janeiro, was, that *Steele & Manton* were fully and absolutely discharged and released from the debt for which the bill was indorsed to the plaintiffs; and that the defendant accepted the bill after such discharge and release, and in ignorance of it. The plea also states that part of the arrangement was, that the holders of bills drawn by *Steele & Manton* upon the London house of *Manton, Steele & Co.*, should be considered as creditors for cash paid, but the respective dividends should be deposited in the Commercial Bank until presentation of the protests of their bills not having been paid; but, the payment in London being verified, those respective sums so deposited should

(a) 3 Camp. 174.

(b) 2 B. & Ad. 328.

(c) 6 Bing. 329.

(d) 8 Bing. 258.

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be divided amongst the creditors. The plaintiffs replied *de injuriâ*, to which the defendant demurred specially.

This plea, so far as regards the account stated, is plainly in discharge, not in excuse, and therefore the replication is to that extent bad. We think also that as regards the count on the bill, the plea shews matter of discharge and release; either that the acceptance was never binding, or, if binding, that it was released by the plaintiffs themselves; and we therefore hold that the replication, even if divisible, is bad, according to the recent cases, which it is not necessary here to enumerate.

But the plaintiffs contend that the plea itself is bad. If it is treated as setting up a release of the drawees before the bill was accepted, then the case of *Drage v. Netter* (a) is an authority to shew that it is bad, because it was made before the defendant was chargeable, even before acceptance.

Again, if the plea be treated as setting up a release of the drawers, it is difficult to see how it can operate to discharge the drawees. It is true that the house at Rio and in London consisted of the same persons; still it is very possible that they may have had different sets of creditors, and that though the house at Rio had stopped payment, the house in London may have been perfectly solvent. The bill may have been drawn for a good and valuable consideration, and it may have been very proper that it should be accepted, although the plaintiffs had agreed that in the event of their not being paid by the drawees they would accept a composition from the drawers, and had executed an instrument by which they discharged them. Indeed, from the clause in the agreement which is above set out, it is plain that the parties to that agreement contemplated that some bills which had been drawn by the one house on the other might be accepted and paid; and in that event the holders were to have the full benefit of such payment, and not to bring the amount into hotchpot. In other words, it is plain that the creditors at Rio did not intend

(a) 1 Ld. Raym. 65.

to discharge the London house, if it should so happen that any of them had the security of that house for their debts. The plea therefore does not shew that the defendant as acceptor, if the acceptance had been already made before the agreement was entered into at Rio, would have been discharged, either by the law at Rio, or by the terms of the agreement; much less does it shew any thing which discharged the drawees from accepting the bill, or released them from paying it, if they did accept it. For these reasons we are of opinion that the plea is bad as an answer to the first count, and that the defendant, having accepted the bill, is bound by that acceptance, notwithstanding what is stated to have taken place at Rio. As regards the account stated, the plea would probably be good, if it had been pleaded to that count only; but, as it is pleaded to both counts, and is bad as to one, it is according to the universal rule bad as to both, and our judgment must be for the plaintiffs.

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Judgment for plaintiffs.

BOSANQUET and others v. WOODFORD and others.


THIS was an issue directed by the Court of Queen's Bench in Trinity Term, 1842, in consequence of a rule Under the 7 Geo. 4, c. 46, which by s. 5 requires that

copies of the annual accounts of banking companies within the act shall be verified by the oath of the public officer, taken before any justice of the peace, and in schedule A. contains a form of such affidavit, ending, "sworn before me, *justice of the peace in and for the said county*:" *Held*, that a return, which appeared on the face of it to be verified "before J. L.," without adding that he was a justice of the peace, was receivable in evidence, it being shewn that J. L. was in fact a justice.

The act requires, by section 5, that such return shall be delivered to the Commissioners of Stamps every year, "between the 28th February and the 25th March:" *Held*, not necessary, in order to make the copy of such return admissible in evidence under section 6, that it should be shewn on the face of such copy or otherwise that the return had been delivered at the Stamp Office within the specified time.

In an issue directed between the partners of a banking company and certain defendants, to try whether the said defendants, as partners in a certain joint stock company, were indebted to the banking company: *Held*, that it was no defence to shew that some of the defendants were also partners in the banking company, as the issue was directed to ascertain the fact of the defendants being indebted, and was not to be determined, like an action, by the legal rights of the parties.

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obtained in the cause of *Bosanquet and others v. Graham*. The following was the form of the issue.

" *Bosanquet and others v. Graham*. Upon reading the rule made, &c. it is ordered that an issue be tried, in which issue the plaintiffs in this action shall be plaintiffs and the said *James Woodford, Ruth Lacey, George King Whitmarch, Henry Hills, James Young, Jeremiah Blake, and Thomas Greaves*, shall be defendants; such issue to be tried at the next assizes to be holden for the county of Wilts; and that such issue shall be for the purpose of trying whether as regards the said *J. W., R. L., G. K. W., H. H., J. Y., J. B., and T. G.*, or any of them, any company or partnership called the Southern District Banking Company was ever constituted; if so, whether the said defendants, or any of them, were partners in the said company; if they were, whether as such they are indebted to the London and Westminster Bank in any and what sum, and that all costs shall abide the event of the said issue in the same way as if the said issue was an action of tort. And it is further ordered that if the plaintiffs in the said issue succeed, judgment shall be given for them on scire facias; and that all proceedings on scire facias be stayed in respect of any defendant that succeeds; and in the event of any difference arising respecting the said issue, then that the same be settled by a judge at chambers; and that the rule made in this cause on Saturday, the 15th of January, in Hilary Term last past, be enlarged until the said issue be determined."

The case was tried before *Cresswell J.* at the Wiltshire Summer Assizes, 1842. The plaintiffs were the partners of the London and Westminster Bank. In order to prove that the defendants were members of the Southern District Banking Company, (which was a joint stock company within the regulations of 7 Geo. 4, c. 46,) they gave in evidence three several accounts or returns, containing the names and places of abode of the members of the company, made out and delivered to the Commissioners of Stamps,

under the 4th, 5th and 6th sections of that act, which are as follows :—

“ 4. And be it enacted, that before any such corporation or copartnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe or take up any money on their bills or notes, an account or return shall be made out according to the form contained in the schedule marked (A.) to this act annexed, wherein shall be set forth the true names, title or firm of such intended or existing corporation or copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation, or by their agent or agents ; and every such amount (a) or return shall be delivered to the Commissioners of Stamps at the Stamp Office in London, who shall cause the same to be filed and kept in the said Stamp Office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said Commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search.

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" 5. And be it further enacted, that such account or return shall be made out by the secretary or other person, being one of the public officers appointed as aforesaid, and shall be verified by the oath of such secretary or other public officer, taken before any justice of the peace, and which oath any justice of the peace is hereby authorised and empowered to administer; and that such account or return shall, *between the 28th February and 25th of March in every year* after such corporation or copartnership shall be formed, be in like manner delivered by such secretary or other public officer as aforesaid to the Commissioners of Stamps, to be filed and kept in the manner and for the purposes as hereinbefore mentioned.

" 6. And be it further enacted, that a copy of any such account or return so filed or kept and registered at the Stamp Office as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the Commissioners of Stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and whom it shall not be necessary to prove to be a Commissioner or Commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return."

The form of the return is given in schedule (A.) of the act, and a form of affidavit annexed. "A. B., secretary, (or other officer, &c.) of the above corporation or *copartnership*, maketh oath and saith, that the above doth contain the name, style and firm of the above corporation or copartnership, and the names and places of abode of the several members thereof," &c. "Sworn before me the (*date*) at _____, in the county of _____, C. D., justice of peace in and for the said county."

The following objections were made to these returns :

1. That it did not appear on the face of either of them, nor was any evidence given, that they were delivered at the Stamp Office within the time prescribed by the act (between the 28th February and 25th March in each year,) the only dates being those of the affidavits annexed (under schedule (A.)) neither of which appeared to be between the 28th February and 25th March.

2. As to two of the returns, that the affidavit shewed them to have been sworn before "*Joseph Lomer*," without any addition of "justice of the peace," so that it did not appear by the jurat that these returns were sworn to before a person having authority to administer the oath.

The learned judge overruled both objections, allowing evidence to be given that *Joseph Lomer* was in fact a justice of peace at the date of the affidavit.

It was proved at the trial that two of the defendants (*Greaves* and *Young*) were partners or shareholders in the London and Westminster Bank (which is not a joint stock bank trading under the 7 Geo. 4, c. 46.) It was contended for the defendants, that the plaintiffs must fail on this evidence, the terms of the last issue being "whether the defendants, as partners in the Southern District Banking Company, were indebted to the London and Westminster Bank."

The learned judge overruled this objection also.

Verdict for plaintiffs.

In the following term *Bompas*, Serjt. obtained a rule to shew cause why the verdict should not be entered for the defendants; or for a new trial, on account of the reception of illegal evidence.

Sir *W. W. Follett* S. G., *Erle* and *Butt* shewed cause (a).

(a) The case was argued in Michaelmas Term last, (Nov. 8 and 20,) before Lord *Denman* C. J., *Patteson*, *Williams* and *Cole-ridge*, Js.

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Bompas, Serjt., *Crowder* and *Ogle*, contrà. 1. The account or return is only evidence of the partnership, by section 6, at the period of its own date, and therefore it is essential that it should appear when it was filed at the Stamp Office. No account is so receivable except one, "filed or kept and registered at the Stamp Office, *as by this act is directed*;" that is to say, between certain days in every year. The provision then cannot be regarded as merely directory. Nor is it any sufficient answer to say that, by section 18, a copartnership neglecting to send returns is liable to forfeit 500*l.* That is a provision for the protection of the public, and in no way touches the question of the validity of the returns for the purpose of evidence: *Ex parte Prescott in re Phillips*(a), *Harwood v. Law*(b). The return to which the name of "*Lomer*" was attached was also inadmissible, from the jurat not shewing the jurisdiction of *Lomer* to take the affidavit. "Where a special statutory power is exercised, the party who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor or by a justice of peace, the facts which gave the authority must be stated;" *Coleridge J.*, in *Christie v. Unwin*(c).

2. As to the other point(d). Undoubtedly the principle of *Bosanquet v. Wray*(e) would apply, if this was an action. And the very terms of the issue, whether the defendants were indebted to the London and Westminster Bank as partners in the Southern District Banking Company, shew that the objection may be equally taken on the trial of it(f).

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the

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| (a) 1 Mont. & Chit. 611. | who shewed cause referred to stat. |
| (b) 7 M. & W. 203. | 1 & 2 Vict. c. 96. |
| (c) 11 Ad. & E. 373; S. C. 3 P. | (e) 6 Taunt. 597. |
| & D. 204. | (f) <i>De Tastet v. Shaw</i> , 1 B. & Ald. |
| (d) On this point the counsel | 664. |

Court as follows:—This was an application to enter a verdict for the defendants, or for a new trial. We shall consider the latter branch of the application first.

It arises out of the trial of certain issues directed by this Court; of which the first was, whether, as regards the defendants or any of them, a certain company, called the Southern District Banking Company, was ever constituted; and if so, secondly, whether as regards the London and Westminster Bank (the plaintiffs) the defendants were partners in the said Southern District Banking Company, and, if so, thirdly, whether they are indebted to the plaintiffs. And the motion is made in consequence of the admission of certain evidence to prove the affirmative of the second issue. That evidence was the return of shareholders, &c. to the Stamp Office, in pursuance of the 7 Geo. 4, c. 46, by the Southern District Banking Company. And the question is, whether these returns were made in conformity to the provisions of that act, or are inadmissible by reason of their alleged deviation therefrom. And this of course leads us to the consideration of the sections of the act on which this question depends. We would premise, however, that as to three (the number received in evidence, according to the learned judge's notes), the main objection prevails. As to two, there was the additional objection, that the person before whom they purported to have been sworn did not describe himself in the jurat as such person as is required by the act to administer the oath.

We think, however, that the substance of the transaction is, that the party verifying the return should be *in fact* duly sworn, and that, therefore, if the party who administered the oath really had jurisdiction, those two returns (so far as this objection is concerned) were properly received.

The principal object of the act in question was to extend the power of corporations and copartnerships under certain restrictions in carrying on the business of bankers. Before any such corporation or company shall avail them-

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selves of the benefit of the act, they are required to make a return in the form of Schedule A., annexed to the act, wherein, amongst other particulars therein mentioned, are to be contained the names and places of abode of all the members of such corporation or copartnership, or of all the partners concerned or engaged in such copartnership, *as the same respectively shall appear on the books of such corporation or copartnership*. It is then provided (by sect. 4) that the amount(a) or return shall be delivered to the commissioners of stamps, and shall be filed, and "an entry and registry thereof" made in a book, to be open to public inspection on payment of 1s.

It may be observed, in passing, that the object of this (the 4th and principal) section obviously is to protect the public, and to facilitate a remedy against all persons composing such corporation or partnership as is therein described. It is obvious also that *no time* for making this return is specified, except only that it shall be done before the corporation or partnership shall have the benefit of the act.

Then follows the 5th section, on which the question arises; and it is thereby enacted, that such account or return shall be certified, on oath, before *any justice of the peace*, by one of the public officers of the corporation or copartnership; and that such account or return shall, *between the 28th day of February and the 25th day of March* in every year, in like manner be delivered by such officer as aforesaid to the Commissioners of Stamps, to be filed, &c. as aforesaid. And, by section 6, a copy of such account or return, certified by one or more Commissioner or Commissioners of Stamps in the manner specified shall be admissible in evidence in proof (amongst other things) "that all the persons named therein as members of such corporation or copartnership were members thereof *at the date of such account or return*." And the objection founded, as already observed, upon the 6th section, is, that such ac-

(a) *Sic.*

count or return is not shewn to have been made within the prescribed period (between the 28th February and 25th of March), there being no date in any of the three, except of the day when the oath was administered to the officer verifying his return; and in each case that date is not within that period.

The objection therefore is certainly founded in fact; but whether it ought to have excluded all these returns is the question. Now the substance of the transaction is the return, by the officer of the corporation or co-partnership, of the names of their respective members. That return is the operative and binding thing. The Commissioners of Stamps have no power of altering such return, or means for the purpose. The office of stamps is a mere deposit, where the return, as it came, is directed to remain, without the possibility of variation. *The date* of the account or return is the material point of time. That is to fix who are, and who are not, members. No *other* date for any material thing to be done is anywhere alluded to; and, *whenever* it may be returned to the Stamp Office, the only material date, (as section 6 declares), is that when the account or return is made, which is when the officer verifies it, and can be no other. We do not therefore think that the Commissioners of Stamps, (who are merely passive in the transaction, and have no authority to interfere as to the time or manner of making them), not having been shewn to have received the returns within the specified time, ought in effect to invalidate them, but that the clause in question ought to be considered as directory only. Seeing, therefore, that they were intended, as has been already observed, to operate solely for the information and benefit of the public, and to bind the corporation or company or co-partnership, we are of opinion that they were properly received in evidence.

The other object of the motion, to enter a verdict for the defendants, is attended with less difficulty, and is more easily disposed of. We do not rely on a preliminary objection, that no leave appears by the notes of the learned

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judge to have been reserved for the defendants. This part of the motion proceeded upon the ground that, because certain individuals are members of each of the contending companies, therefore no action can be maintained by the one against the other. And in support of this proposition the case of *Bosanquet and others v. Wray(a)*, and other authorities to the like effect, were cited. But this is *not* such an *action*. It is an issue directed by this Court to ascertain certain facts with a view to ulterior proceedings. And there is no reason why it may not for such purpose vary the legal position and rights of the parties, as in issues directed by the Court of Chancery is constantly done. In such case, nothing is more usual than that a special direction should be given not to set up partnership or bankruptcy, or that a witness wholly incompetent in point of law should be examined upon the trial. And, in the present instance, the third issue is expressly directed to try whether the Southern District Banking Company (the defendants) are indebted to the plaintiffs. Upon such trial it is no answer to say (supposing that with truth it may be said) that the plaintiffs could not sue the defendants for any debt. That is not the nature of the inquiry.

Upon the whole, therefore, we are of opinion that the rule must be discharged.

Rule discharged.

(a) 6 Taunt. 597.



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Tuesday,
Dec. 5.

DOE d. HARTRIDGE v. GILBERT.

SPECIAL case, stating as follows:—In August, 1788, *James Foster* was married to *Catherine Clifford*, and in contemplation of marriage a settlement was made of the property which is the subject of this action.

By indentures of lease and release, bearing date respectively the 22d and 23d of August, 1788, the property sought to be recovered in this action was conveyed to trustees to the use of *James Foster* and his heirs, until the marriage, remainder to the use of *James Foster* and his assigns for life, remainder to the trustees to preserve contingent remainders; and after the decease of the said *James Foster*, to the use of *Catherine Clifford*, his intended wife, and her assigns for her life; and after the death of the survivor, to the use of all and every the children of *James Foster* and *Catherine Clifford*, to be equally divided between them (if more than one) share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of the bodies of all and every such children

In this settlement was contained the following proviso: Provided always, and it is hereby declared and agreed by and between all the said parties to these presents that it shall and may be lawful to and for the said *James Foster*, at any time or times during his life, and after his decease to or for the said *Catherine Clifford*, his intended wife, at any time or times during her life, by indenture under his or her respective hand and seal, to demise or lease the said messuages or tenements, land, hereditaments and premises

A marriage settlement, by which certain land was conveyed to the husband for life, remainder to the wife for life, remainder to the children of the marriage as tenants in common in tail, contained a power to the wife, in the event of her surviving her husband, to lease by indenture under her hand and seal for any term not exceeding 21 years in possession, so that the best annual rent should be reserved, and that none of the lessees should be punishable of waste by any express words to be therein contained, and so as in every of the said leases there should be contained a clause of re-entry for non-payment

of rent, and that the lessees should seal and deliver a counterpart thereof.

The wife survived her husband, and married the defendant, and after the marriage demised to him by indenture under her hand and seal, at a rent assumed to be the best annual rent, the property comprised in the settlement, to hold for fourteen years from the 14th of October, 1834, if the lessee should so long live, and a counterpart was executed by the defendant.

Held, that this was not a valid execution of the power as against the tenants in tail in remainder, because a power coupled with an interest requires a bargain between independent persons.

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hereby granted and released, or intended so to be, or any of them, or any part thereof, to any person or persons for any term or number of years not exceeding twenty-one years in possession, and not in reversion, remainder or expectancy, so as upon every such lease there may be reserved and made payable during the continuance thereof the most and best improved yearly rent that can be reasonably had or obtained for the same, without taking any sum or sums of money or other thing by way of fine or income for or in respect of such lease or leases, and so as none of the lessees be made punishable of waste by any express words to be therein contained, and so as in every of the said leases there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved; and so as the lessee or lessees, to whom such lease or leases shall be made, do seal and deliver a counterpart or counterparts thereof, any thing herein contained to the contrary thereof in anywise notwithstanding.

The marriage took place on the 26th of August, 1788, *James Foster* died in 1811, and his wife died in October, 1841, and there was issue of the marriage two sons and four daughters.

The lessors of the plaintiff were the children, or the legal representatives of the children of this marriage, and the plaintiff was entitled to recover in this action if no valid lease was executed by the widow.

In August, 1812, the widow of *James Foster* married *Thomas Gilbert*, and on the 18th April, 1835, executed an instrument which contained a demise of the property sought to be recovered in this action to her husband, *Thomas Gilbert*, for fourteen years, from the 11th of October, 1834, (if the lessee should so long live,) at the yearly rent of 64*l.*, payable half yearly on the 6th of April and the 11th of October. A counterpart of this instrument was executed by *Thomas Gilbert*. The validity of this instrument as a lease under the power contained in the marriage settlement is disputed by the lessors of the plaintiff; but it has

been agreed that they shall not make any objection to its validity on account of the rent reserved.

If the Court shall be of opinion that it was not a valid execution of the power contained in the indenture of the 23d of August, 1788, judgment is to be entered for the plaintiff by confession; if they are of opinion that it was a valid execution of the said power, judgment is to be entered for the defendant by *nolle prosequi*.

The case was argued in Trinity Term last (a), by *Thesiger* for the lessors of the plaintiff, and by *Platt* for the defendant; but the nature of the arguments used and the authorities cited appears so fully from the judgment of the Court, that it is not thought necessary to report them at length.

Cur. adv. vult.

Lord DENMAN C.J., now delivered the judgment of the Court as follows :

In this case the question turned on the validity of a lease granted by a tenant for life under a marriage settlement, to which the only objection was that it was granted by a wife to her husband,—by the widow of the settlor to the person whom she married after the death of her former husband, the settlor.

The power of leasing reserved to her by the settlement was “by indenture under her hand and seal to demise or lease the premises to any person or persons” for twenty-one years, so as upon every such lease there be reserved the best rent; “and so as none of the said leases be made dispunishable of waste by any express words to be therein contained; and so as in every of the said leases there be contained a clause of re-entry for non-payment of the rent; and so as the lessee do seal and deliver a counterpart thereof.”

It was argued on behalf of the lessors of plaintiff, who

(a) June 2, before Lord Denman C. J., Patteson, Williams and Coleridge Js.

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 GILBERT.

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were entitled in remainder under the marriage settlement, that this lease is void, because husband and wife being one person in law can make no grant to each other.

It was also urged that the restrictions on the power of leasing contained in the marriage settlement could not be enforced where the wife demised to the husband, for she can neither re-enter and eject him on non-payment of the rent or breach of any other covenant, nor make him answerable for waste, nor take from him any binding counter-part of the lease. There is no case in point. For the defendant we were referred to *Co. Lit.* 52 a, 112 a, 187 b, and *Bro. Abr.* tit. Executor, pl. 17; but one answer applies to all those passages that appear favourable to him: the wife was acting in *auter droit* in all the cases where she is recognized by law as having power to act independently of, or in opposition to, her husband. *Lady Antrim's case* was also cited from the Chancery Cases, 18, which is found also in 16 *Vin. Abr.* 481; *Comyn's Dig.* Poiar (c. 1. b.), and 3 *Salk.* 276. But that case merely laid down, that where a feme sole reserves a power of leasing, and marries, her execution of that power is defective for no other reason than that her husband joined in making the lease. Supposing this decision sound, which may be doubted from other decisions reported in the same page, and from a case under the head "Authority" (a) in the same book, it certainly adds no force to the defendant's argument.

But in this case recourse was had to the principle, that, where a power of appointment is executed, the party creating the power is considered in law as the party conveying, and the party who executes merely as an instrument in his hands. We think, however, that tenant for life, with power to grant leases, is not in the situation of one who is merely empowered to appoint, but that he has a power coupled with an interest, which requires a bargain between independent persons, and a grant which is not void at law.

(a) *Harris v. Graham*, 3 *Vin. Ab.* 419.

The conditions annexed to every leasing power are for the benefit of the remainder-man, and the protection of his interest in the property, when the life estate shall have terminated.

It is enough to refer for a statement of this doctrine to 1 *Burr.* 121, 2, (a); and though such remainder-man has his remedy on the covenants of the lease, when his estate vests in possession, it is manifest that that protection may be lost for want of a liability in the lessee during the co-verture.

The mischief may be incurable after a long enjoyment with complete immunity.

We are therefore of opinion that the lessors of the plaintiff are entitled to our judgment.

Judgment for plaintiff.

(a) *Taylor d. Atkyns v. Horde.*

### HUGGINS v. COATES.

**ASSUMPSIT** for money had and received, interest, and on an account stated.

Pleas, 1. Non assumpsit.

2. Statute of Limitations.

3. That before the making of the defendant's promise, to wit, on the 13th of June, 1826, by an indenture made between the defendant of the first part, *A. B. and C.* of the second part, the plaintiff of the third part, and *D.* of the fourth part, in consideration of 1500*l.* paid by the plaintiff to the defendant, the defendant did covenant with the

defendant, the rule nisi stating amongst other grounds a defect in the memorial, but it did not appear from the rule absolute that the judgment and warrant of attorney were set aside upon that ground, and no examined copy of the memorial was produced by the defendant, nor any defect therein proved:—

*Held*, 1. That an action for money had and received lay by the plaintiff to recover the consideration of the annuity.

2. That the Statute of Limitations was no bar to the action, the defendant not having proved the annuity to be void ab initio.

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*d.*  
*HARTRIDGE*  
*v.*  
*GILBERT.*

*Saturday,*  
*Dec. 9th.*

Where an annuity was granted by the defendant to the plaintiff in 1826, part of the securities for which was a warrant of attorney and judgment, which were afterwards, in 1842, set aside by the Court, upon applica-



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plaintiff that he the defendant would during the term of ninety-nine years from the day and year last aforesaid, if the defendant should so long live, pay to the plaintiff, at, &c., an annuity of 225*l.*, by equal quarterly payments, to be made, &c. And the defendant further says that the said indenture not having been duly memorialized according to the statute made and passed in the 53rd year of the reign of his late Majesty King George the Third, and the same being null and void, the said sum of money in the said first count mentioned is sought to be recovered by the plaintiff as money received by the defendant to his use, being the said sum of 1500*l.*, the consideration so advanced and paid for the said annuity as aforesaid. And the defendant further says that the advance and payment of the said sum of 1500*l.* was, to wit, on the said 13th day of June, 1826, solicited and procured of and from the plaintiff for the defendant by one *Daniel Davies*, and the said *Daniel Davies* before the said advance and payment, and before the making of the said indenture, to wit, on the day and year last aforesaid, asked and demanded of and from the defendant a greater sum and sums of money, gratuity and reward, for soliciting and procuring the said advance and payment, than the sum of 10*s.* for every 100*l.* advanced and paid, that is to say, the said *Daniel Davies* then asked and demanded of the defendant a large sum, to wit, 300*l.*, and at the time when the said indenture was made, and when the said advance and payment of the said sum of 1500*l.* was so advanced and paid to the defendant, the said *Daniel Davies* took and received thereout the sum of 300*l.* for soliciting and procuring the said advance and payment, contrary to the said statute. And the defendant avers that the plaintiff advanced and paid the said sum of 1500*l.* to the defendant partly for the purpose of his paying to the said *Daniel Davies* the said sum of money, gratuity and reward, and the plaintiff before and at the time of his said advance and payment well knew that part of the money so advanced and paid to the defendant as aforesaid would be

appropriated and applied in paying the said *Daniel Davies* the said sum of money, gratuity and reward, for soliciting and procuring the said loan and advance, and that the said *Daniel Davies* would take and receive the same thereout. Verification, &c.

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4th. And for a further plea in this behalf to the said first count, the defendant saith, that before the making of the said supposed promise in that count mentioned, to wit, on the 13th day of June, 1826, by an indenture then made between the defendant of the first part, *A. B. and C.* of the second part, the plaintiff of the third part, and *D.* of the fourth part, in consideration of 1500*l.* paid by the plaintiff to the defendant, the defendant did covenant with the plaintiff, (setting out the same covenant for the payment of the annuity alleged in the first plea.) The plea then went on to allege, that the indenture not having been duly memorialized, and having been vacated, the money sought to be recovered by the plaintiff in that count was the consideration money for the said annuity, and then continued as follows: And the plaintiff so seeks to recover back the said sum of 1500*l.* as aforesaid, on the ground and by reason that the grant of the said annuity was null and void, and that the same has been vacated, nevertheless the defendant says that the plaintiff did not at any time before the commencement of this suit request or demand of the defendant that he would repay to him the said sum of 1500*l.*, and the defendant did not at any time before the commencement of this suit refuse to repay the plaintiff the said sum of 1500*l.*, or any part thereof. Verification, &c.

5th. To the first count, fraud and covin.

6th. As to 675*l.* payment.

7th. As to 675*l.* set off.

Replication. To the second plea, that the said several causes of action in the declaration mentioned, and each of them, did accrue to the plaintiff within six years next before the commencement of the suit.

To the third plea, a traverse that the plaintiff knew that

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any part of the money so advanced and paid to the defendant as in that plea alleged would be appropriated to paying the said *Daniel Davies* in that plea mentioned the sum of money, gratuity or reward, in the said third plea mentioned, for soliciting or procuring the loan in that plea mentioned, or that the said *Daniel Davies* would take or receive the same thereout in manner and form, &c.

To the fourth plea, that before the commencement of the suit, to wit, &c., the plaintiff did request and demand of the defendant that he would repay him the said sum of money in the said fourth plea mentioned, concluding to the country.

To the fifth, sixth and seventh pleas, a traverse of the fraud and covin, payment, and set off, respectively alleged in these pleas.

The cause was tried before Lord *Denman* C. J. at Westminster, at the sittings after Michaelmas Term, 1842. At the trial the annuity deed was put in, and it appeared that the annuity had never been paid since the first year, but that the defendant continued to reside in this country, in Stanhope Street, after the granting of the annuity, till the year 1829, when he went abroad, and did not return till 1839. In 1842, the plaintiff having arrested the defendant for 3000*l.*, being the sum for which judgment had been entered up on the warrant of attorney given to secure the annuity, the defendant obtained a rule from the Court of Queen's Bench to shew cause why "the warrant of attorney and judgment given to secure the annuity, and the *testatum capias ad satisfaciendum* and subsequent proceedings should not be set aside, and the defendant discharged out of custody," which was afterwards made absolute, and the plaintiff put in evidence the above rule, but he did not produce any examined copy of the memorial of the annuity, nor prove otherwise than by the rule nisi and the rule absolute for setting the warrant of attorney and judgment aside the existence of any defect in the memorial. The rule nisi disclosed the following grounds for the appli-

cation: "First, that the warrant of attorney was given to secure the payment of an annuity void by the Annuity Act, by reason of the memorial of the deed of grant of the said annuity being defective in the names of the parties, the deed being described therein as of three parts, and being of four parts, one *John Billingham* being a party to the said deed, and his name being omitted in the said memorial. Secondly, That it was improperly described as a warrant of attorney in the sum of 3000*l.*, instead of a warrant of attorney to confess judgment for that sum; that *James Howard* and *Andrew Freeman*, mentioned as parties thereto, were not described as attorneys of the Court of King's Bench; that it was not stated in the memorial that the said warrant of attorney was for securing payment of the said annuity; that the consideration for the purchase of the said annuity, and how paid, and the amount of the said annuity, were not stated in the said warrant of attorney or memorial thereof. Thirdly, that the warrant of attorney was not properly stamped, and that the judgment ought to have been revived by scire facias. Fourthly, that the judgment was in the name of *Huggins* as plaintiff, and the testatum capias ad satisfaciendum issued at the suit of *Huggins*, and that the testatum capias ad satisfaciendum was tested as having been issued in the year 1802.

The rule absolute was in the following words:—

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| <p><i>John Huggins</i><br/>v.<br/><i>Robert Coates.</i></p> | } | <p>Upon reading the rule made in this cause on Monday, the 19th day of April, in this term, and the affidavit, &amp;c., it is ordered that the warrant of attorney upon which judgment has been entered up in this action, the judgment and execution, and other proceedings be set aside without costs, and that the defendant be discharged out of the custody of the sheriff of the county of Sussex at the suit of the plaintiff in the name of <i>Huggins</i>. And it is further ordered that the defendant shall not bring any action against any of the parties concerned in the execution, including, amongst others, the said sheriff.</p> |
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For the defendant it was objected at the trial that no defective memorial of the grant of annuity had been shown, and that it did not appear from the rules nisi and absolute that the warrant of attorney and judgment had been set aside, because they were given to secure an annuity void by the Annuity Act. For the plaintiff *Scurfield v. Gowland* (a) and *Cowper v. Godmond* (b) were cited; and the jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiff with 1500*l.* damages on the first issue, with liberty to the defendant to move to enter a nonsuit, and for the plaintiff also on the second issue, with liberty to the defendant to move to enter a verdict for him on that issue; the remaining issues, with the exception of the fourth, were also found for the plaintiff, and the fourth issue for the defendant.

*Hoggins*, in the Hilary Term following, accordingly obtained a rule nisi for a nonsuit, and to enter a verdict for the defendant upon the second issue, against which

*Platt* shewed cause (c). The plaintiff is entitled to recover back from the defendant the money paid by him as the consideration for the purchase of the annuity, a portion of the securities having been set aside. The plaintiff contracted for one entire assurance, consisting of several securities, and he has a right to have that assurance entire, or to have back his money; *Scurfield v. Gowland* (a).

Nor is the plaintiff barred by the Statute of Limitations, for the statute does not begin to run till the security has been avoided. The annuity acts are for the protection of grantors of annuities, and the grantee has no right of action for the recovery of the consideration paid for the purchase of the annuity till the grantor has avoided the security; till then the money is not money had and received by the grantor to

(a) 6 East, 241.

(b) 9 Bing. 748.

(c) On a former day in this

vacation (December 5), before Lord Denman C. J., Patteson, Williams and Coleridge Js.

the use of the grantee; *Cowper v. Godmund* (a). It is true that there had been payments in that case on account of the annuity within six years of the commencement of the action, but it was not decided on that ground. *Tindal* C. J. expressly says "The cause of action comprises two steps. The first is the original advance of the money by the grantee; the second, the grantor's election to avail himself of the defect of the memorial of annuity. The cause of action, therefore, was not complete till the last step was taken in Michaelmas Term, 1830. If we were to decide otherwise, the grantor of a defective annuity might in every case defraud the annuitant by paying the annuity for six years, and then, having set aside the securities, by pleading the Statute of Limitations." The cause of action, therefore, arises on the avoidance of one of the securities and not before, and the statute therefore in this case is no bar to the action.

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*Hoggins and Winser* contra. The rule absolute for setting aside the warrant of attorney is general, and does not state the grounds on which the warrant of attorney and other proceedings were set aside, but it appears from the rule nisi that there were other objections to them besides the alleged defect in the memorial of the annuity, namely, the want of a proper stamp. No examined copy of the memorial was produced by the plaintiff at the trial, and for any thing that appears on the evidence the memorial may not have been defective at all, and the warrant of attorney and other proceedings may have been set aside by the Court for want of a stamp, or for irregularity. It does not therefore appear that the defendant is within the principle of the case of *Scurfield v. Gowland* (b) and *Cowper v. Godmond* (a), for he is not the grantor of an annuity taking advantage of the provisions of the Annuity Act to set aside his grant of annuity, and electing to treat it as a void grant. But here is an annuity

(a) 9 Bing. 748.

(b) 6 East, 241.

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still subsisting, the warrant of attorney and judgment only having been vacated for some defect, which for any thing that appears does not spring out of the Annuity Act. In *Scurfield v. Gowland* (a), the application was to set aside the annuity, and under stat. 17 Geo. 3, c. 26, the act then in force, a defect in the memorial with regard to any of the securities rendered the annuity deed itself void. But now by stat 3 Geo. 4, c. 92, the deed granting the annuity is valid if a memorial of it has been duly inrolled, notwithstanding the omission to inrol any other assurance for securing the annuity. There is therefore here at the present moment a valid annuity deed in existence, and there has been no demand by the grantee of his principal money, and no election by the grantor to treat the grant of the annuity as void. But, if it is to be treated as a void grant, then it became void from the time of the defect in the inrolment, that is, from thirty days after the execution of the deed, and the statute runs from that time. The grantor, by neglecting to avail himself of the defect in the memorial for a time, cannot derogate from the right given by the act of parliament, which is a public right: *Crosby v. Arkwright* (b). But it has never been treated by the grantee as a subsisting annuity, for although the grantor of the annuity was in this country for some time after the grant of the annuity, no payment was ever made by him in respect of it, nor any demand made upon him by the grantee. In *Cowper v. Godmond* (c) the annuity had been treated by both parties as a subsisting annuity for some time, and payments had been made on account of it within six years before the commencement of the action.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows :—This was an action to recover back the consideration money paid for an annuity in the year 1826.

(a) 6 East, 241.

(b) 2 T. R. 603.

(c) 9 Bing. 748.

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One of the securities given was a warrant of attorney, on which judgment was entered up, the warrant and judgment were set aside on motion in the year 1842, but it did not appear on what grounds. The defendant pleaded, amongst other things, the Statute of Limitations, but the verdict was taken for the plaintiff. The defendant's counsel contended that this action would not lie, as it did not appear on what ground the warrant of attorney was set aside, and it might be that the annuity was still a valid one. The case of *Scurfield v. Gowland* (a) is an answer to this argument, where it was expressly held that the loss of one out of several securities makes a failure of the consideration for which the purchase money of the annuity was paid, and entitles the plaintiff to maintain this action. Then the defendant's counsel contended that the Statute of Limitations was a bar, inasmuch as the annuity was void, and the six years began to run from the granting of it. The answer is, that there was no proof that the annuity was void. The ground on which the warrant of attorney was set aside did not appear, as he himself argued, and it might have been for some cause for which it was voidable only and not void, and so the statute would not run until it was avoided, viz. not till 1842: it lay on the defendant, as to this issue, to shew that the annuity was void ab initio, in order to bring into question the doctrine laid down in *Cowper v. Godmond* (b). It is true that the fourth plea states that there was no memorial, and goes on to add that there was no demand before action, and the replication traverses the demand only, but this admission that there was no memorial is available only as to that issue, and cannot be taken into account as to the others. This rule must therefore be discharged.

Rule discharged.

(a) 6 East, 241.

(b) 9 Bing. 748.





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Monday,  
Dec. 4.

GIBBS v. WHATLEY.

Where an action of assumpsit was tried at the assizes and the plaintiff recovered a verdict for 2*l.*, and the judge refused to certify that it was a proper cause to be tried before him, the costs of the attorney for attendance at the assizes are to be taxed on the lower scale according to the directions of schedule 3 of the rule of Hilary Vacation, 4 *Will.* 4, as those directions apply to country as well as to town causes.

*GRAY* had obtained a rule to shew cause why the Master should not review his taxation.


It appeared that the cause had been tried at the assizes at Gloucester, and the plaintiff had obtained a verdict for 2*l.*, whereupon the judge refused to certify that the cause was proper to be tried before him under the rule of Hilary Vacation, 4 *Will.* 4. The items objected to were the allowance of fourteen guineas for the attendance of the attorney at the assizes at Gloucester seven days, and similar allowances to witnesses.

*Humfrey* shewed cause (a). The directions to taxing officers under the rule of Hilary Vacation, 4 *Will.* 4, which provide that when the judge refuses to certify the lower scale of taxation shall be applicable, have been followed as far as the case will permit, and the costs have been charged upon the lower scale upon all matters to which the rule is applicable. But the rules do not extend to causes tried at the assizes. The only allowance authorized by Schedule III., which governs the costs where the cause has been tried at nisi prius, and not before the sheriff, is "attending court on trial 1*l.* 1*s.*," which would be an inadequate remuneration for seven days attendance at the assizes.

*Gray* contra. The directions clearly apply to country causes, for there is this provision, "For every witness the allowance for travelling to be the expense actually paid not exceeding one shilling a mile, unless under special circumstances," and in this bill the attorney is allowed eleven shillings for mileage, besides the two guineas a day. The object of the rules was to secure the trial of actions when the sum recovered should fall short of 20*l.* at as little

(a) In last Trinity Term (June 15) before Lord Denman C. J., Patterson, Williams and Coleridge Js.

expense as possible. If 2*l.* 2*s.* a day should be allowed for attendance at the assizes, a cause may be entered late at the assizes for the purpose of securing that charge as long as the assizes last. The words of the schedule are express, "in *all* actions of assumpsit, &c. where the sum recovered shall not exceed 20*l.*, the plaintiff's costs shall be taxed according to the reduced scale," and the proviso clearly applies to the assizes, for it mentions the case of a trial before a judge of one of the superior courts or "judge of assize." The scale of costs must therefore be regulated by the schedule given in the directions to taxing officers of Hilary Vacation, 4 *Will.* 4.

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*Cur. adv. vult.*

Lord DENMAN C. J. now said the Court was of opinion that the rule applied to country as well as to town causes, and that the costs to the attorney for his attendance must be reduced accordingly.

Rule absolute.

HODGKINSON *v.* WYATT (*a*).

**DEBT** on a bond, made to plaintiff by defendant, dated 7th January, 1837, in the penal sum of 1200*l.* The condition, set out in the declaration, recited that the plaintiff had on that day lent and advanced to defendant 600*l.*, at 5*l.* per cent. per ann., for seven years certain, and upon the treaty for the said loan it was agreed that the repay-

Where a bond is conditioned for the repayment of a sum with interest, at 5*l.* per cent., to be computed from a day earlier than that of the advance of the money as

(*a*) Decided in Trinity Term last (May 25).

recited in the condition of the bond (the issue being in an action on the bond, whether the bond were given on a corrupt agreement for payment of more than 5*l.* per cent.), the bond and condition put in by the defendant are *prima facie* evidence that the contract was usurious, and it lies on the plaintiff to offer explanation.

Where the loan secured by a bond is also collaterally secured by the deposit of title deeds of leasehold lands, *Held*, that such a contract is not protected by 2 & 3 *Vict.* c. 37, s. 1, being within the proviso at the end of that section as a loan on the security of lands, tenements, &c.

*Semble*, that stat. 2 & 3 *Vict.* c. 37, s. 1, is retrospective.

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ment of the same sum, and interest as aforesaid, should be secured to the said plaintiff, his executors, administrators and assigns, by the above written bond or obligation, conditioned in manner thereafter mentioned, and also by the deposit of a certain indenture of lease, bearing date on or about the 18th day of April, 1826, of two messuages to defendant for thirty-one years, from 24th June, 1826, at the yearly rent of 92*l.*; and also by the deposit of a certain other lease, of the 25th October, 1822, of land with buildings thereon to one *James Powell*, for eighty years and a half, from the 25th March, 1821, at the yearly rent of 8*l.* 8*s.*, together with the subsequent deeds vesting the same in the defendant; and also by the deposit of a certain other indenture of lease, dated 18th September, 1827, of land and buildings to defendant for seventy-four years and a half, from 25th March, 1827, at the yearly rent of a pepper corn, if demanded. The bond then recited the deposit of these deeds by defendant with plaintiff as a collateral or equitable security for the repayment of the said sum of 600*l.* and interest as aforesaid. The condition was that defendant, his heirs, executors or administrators, should pay to plaintiff, his executors, &c., the said principal sum of 600*l.* on the 1st day of January, 1844, being the expiration of seven years from the date thereof, with interest in the mean time, after the rate of 5*l.* per cent. per annum, to be computed from the 1st day of January then instant, by equal half-yearly payments on the 1st day of July then next ensuing, and on each 1st day of January and 1st July in every succeeding year during the said term of seven years, or until the principal sum of 600*l.* should be fully paid and satisfied, without any deduction or abatement out of the said principal sum or the interest thereof respectively, or any part thereof, on any account whatsoever.

The declaration then averred that after the making, &c., to wit, on 1st July, 1841, a large, &c., to wit, the sum of 15*l.*, being the interest of half a year expiring on that day, became and still was due; by which breach the bond was


forfeited, and an action had accrued, &c., yet defendant had not paid, &c.

Plea (setting out the bond and condition on oyer): that before the making, &c. and before the passing of stat. 2 & 3 Vict. c. 37, "It was corruptly, and against the form of the statute in that case made and provided, agreed by and between the plaintiff and the defendant that the plaintiff should lend and advance unto the defendant 600*l.*, and that the plaintiff should forbear and give day of payment thereof to the defendant until and upon the 1st January, 1844, and that the defendant should repay to the plaintiff the said sum of 600*l.* on the day and year last aforesaid; and that the defendant, for the loan of the said sum of 600*l.*, and for giving day of payment thereof as aforesaid for the time aforesaid, should give and pay to the plaintiff more than lawful interest, at and after the rate of 5*l.* per cent. per annum on the said principal sum of 600*l.*, that is to say, fourteen sums of 15*l.* each" (to be paid respectively on the 1st of July and January, down to 1st January, 1844, inclusive), "being the said interest in the said condition mentioned on the said principal sum of 600*l.* at and after the rate of 5*l.* per cent. per annum, to be computed from the said 1st day of January in the said condition mentioned as instant; and that for securing the payment of the said 600*l.* and the said fourteen sums of 15*l.* each as aforesaid to the plaintiff, he the defendant should make and seal and as his act and deed deliver to the plaintiff a certain writing obligatory, and should thereby bind himself in the penal sum of 1200*l.*, conditioned for the payment of the said sum of 600*l.* on the said 1st day of January, A. D. 1844, aforesaid, with interest for the sum of 600*l.* at and after the rate of 5*l.* per cent. per annum, to be computed from the 1st day of January then instant, by equal half-yearly payments, on the 1st day of July then next ensuing, and on each 1st day of January and 1st day of July in every succeeding year, during the term of seven years, ending on the 1st of January, A. D. 1844, or until the said principal sum of 600*l.* should

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be paid, &c., and should deposit with the plaintiff certain indentures, being the indentures mentioned in the said recitals to the said condition, as a collateral or equitable security. That in pursuance of the said corrupt and unlawful agreement, the plaintiff afterwards, after the making thereof, and before the 1st day of January, A.D. 1844, to wit, on the said 7th day of January, A.D. 1837, before the making and passing of the said first mentioned statute, lent and advanced to the defendant the said sum of 600*l.* upon the terms aforesaid; and that for securing the payment thereof, and of the said fourteen sums of 15*l.* each, to be paid and given to the plaintiff as aforesaid for the purpose aforesaid, the defendant, in further pursuance of the said corrupt and unlawful agreement, after the making thereof, and before the making of the said first mentioned statute, to wit, on the said 7th day of January, A.D. 1837, aforesaid, made and sealed, and as his act and deed delivered to the plaintiff, and the plaintiff then and before the making of the said first mentioned statute accepted and received of and from the defendant, in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid, the said writing obligatory in the said declaration mentioned." That the said fourteen sums of 15*l.* each, together amounting to the sum of 210*l.*, reserved and made payable to the plaintiff by the condition as aforesaid, together exceed the rate of 5*l.* per cent. per annum, contrary to the form of the statute, &c. By means whereof and by force of the statute, &c., the said writing was and is wholly void in law.

Replication, denying the usury, concluding to the country. Issue joined.

The cause was tried before *Tindal C. J.*, at the Surrey Summer Assizes, 1841. The defendant's counsel (it being decided that the onus of proof lay on the supporters of the plea) put in the bond and condition; no other evidence was offered on either side. The Lord Chief Justice directed a verdict for the defendant, which was entered accordingly.

*Platt*, in Michaelmas Term, 1841, moved for judgment non obstante veredicto, or for a new trial (a). The plea sets up a corrupt agreement; some evidence was therefore necessary, in order to shew the intention of the agreement. That could not be inferred at once from the reading of the bond and condition, inasmuch as it is consistent with those instruments that the defendant might have been indebted to the plaintiff in more than 600*l.*; and this might especially be intended, when the whole usury complained of is simply the charging six days' more interest than lawful in the course of seven years. [*Wightman J.* The bond was *prima facie* evidence of a contract for the loan of 600*l.* only; the burden of explaining this, so as to render the interest lawful, seems to me to have lain on the plaintiff.] The motion for judgment non obstante veredicto was on the ground that the statute 2 & 3 Vict. c. 37 (b), s. 1, is retrospective, and protects the contract.

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Per CURIAM.—Rule nisi for judgment non obstante veredicto only.

*Thesiger* and *Knapp* in Michaelmas Term, 1842 (c), shewed cause, and cited *Ex parte Banglay* (d), *Marsh v. Martindale* (e). Even if the statute 2 & 3 Vict. c. 37, has a retrospective operation, this contract is excluded from it by the proviso at the end of section 1: "Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements or hereditaments, or any estate or interest therein:" *Berrington v. Collis* (f).

(a) Nov. 6, before Lord Denman C. J., *Williams, Coleridge* and *Wightman Js.*

(b) Continued to 1 Jan. 1846, by 3 & 4 Vict. c. 83, 4 & 5 Vict. c. 54, and 6 & 7 Vict. c. 45.

(c) Nov. 10, before Lord Den-

man C. J., *Williams, Coleridge* and *Wightman Js.*

(d) 1 Rose's Cases in Bankruptcy, 168.

(e) 3 B. & P. 154, 159.

(f) 5 Bing. N. C. 332.

*Platt and C. Jones contra, cited Ex parte Price (a).*

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*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—It was argued in this case that usury could not be presumed from the record, because it did not appear that the whole consideration was money advanced on the 7th of January. We refused a rule as to this point, thinking that the jury were bound to take the facts merely as they appeared on the bond. But a rule was granted for entering a verdict non obstante veredicto, it being contended that stat. 2 & 3 *Vict.* c. 37, s. 1, protected the contract. It appeared from the condition of the bond that more than 5*l.* per cent. per annum was taken for the first half year, and on the argument it was scarcely denied that this would have been usurious under the old law. The defendant contended that stat. 2 & 3 *Vict.* c. 37, s. 1, did not apply to the case, having been passed after the bond was executed. As to this, however, we can see nothing in the statute that restrains it from operating retrospectively. But the defendant relied also on the proviso at the end of section 1. And as to this, we think that the proviso does comprehend cases both of collateral securities and of equitable mortgages, whether of freehold or leasehold property. On this ground we think that the plea is good.

Rule discharged.

(a) 3 Madd. 132.



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## CLAYTON v. CORBY.

Monday,  
December 4th.

**TRESPASS** for entering the plaintiff's close and digging clay.

Second plea: that before and at the said several times when, &c., defendant had been and was the occupier of a certain tenement and premises, to wit, a brick kiln, with the appurtenances, situate, &c. And that defendant, whilst he was such occupier as last aforesaid, and all the occupiers for the time being of the said last mentioned tenement with the appurtenances, for the full period of thirty years next before the commencement of this suit, have respectively had and enjoyed as of right and without interruption, and defendant still as of right ought to have and enjoy a right to dig, take and carry away, in, out of and from the said close in which, &c. *so much of the clay of the said close in which, &c. as was at any time required by him* and them, his and their servants, for the purpose of making bricks in and at the said last mentioned brick kiln, in every year and at all times of the year; and that defendant, at the said several times when, &c., having occasion for and requiring clay for the purpose of making bricks in and at his brick kiln, did then and while he was such occupier of the last mentioned tenement and premises, to wit, the brick kiln with the appurtenances, and entitled to the said last mentioned right, to wit, at the said several times when, &c., for the purpose last aforesaid, enter upon the close in which, &c., and did then dig in, from and out of the close so much clay as at said several times at which, &c. he respectively required for the purpose of making bricks in and at the brick kiln; and the said clay so then dug did, at the said several times at which, &c., take and carry away from the said close in which, &c. to the brick kiln, for the purpose last aforesaid, and for which said purpose the same was then and there used, &c. Verification.

A plea, in trespass, justifying under a claim, that defendant, as occupier of a brick kiln, and all the occupiers for the time being of the kiln for thirty years next before the commencement of the suit, had a right to dig and take away from the plaintiff's close, in every year and at all times of the year, so much clay as was at any time required by him and them for the purpose of making bricks, *Held* bad on motion non obstante verdicto, as the claim was an indefinite claim to all the clay of the close.



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Replication, traversing the alleged right modo et formâ.  
 Conclusion to the country.

Issue thereon.

The case was tried before *Williams J.*, at the Buckinghamshire Summer Assizes, 1842, and the defendant had a verdict on this issue.

*Byles*, in the following Michaelmas Term, obtained a rule to shew cause why judgment should not be entered for the plaintiff on the second issue for nominal damages, notwithstanding the verdict for the defendant, on the ground that the right claimed was an unlimited right in alieno solo, and therefore bad.

*Biggs Andrews*, in shewing cause (a), referred to *Co. Lit.* 122 a, *Duberley v. Page* (b), *Peppin v. Shakespear* (c), as authorities in recognition of such a right.

*O'Malley* contra. In the same passage which has been cited from *Co. Lit.*, it is said that there cannot be a prescription or custom to exclude the owner of the soil. He also cited *Benson v. Chester* (d), *Wilson v. Willes* (e), *Wilkes v. Broadbent* (f), 3 *Cruise*, Dig. tit. xxxiii. s. 32, p. 71 (4th ed.), citing *Valentine v. Penny* (g), *Dean of Ely v. Warren* (h), and *Hayward v. Cunningham* (i), where a case was cited that a prescription for digging clay in another's soil to make pots is void.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—This was an application on behalf of the plaintiff for leave to enter a verdict for him with nominal

(a) In Trin. Vac. last, before Lord Denman C. J., *Patteson, Williams and Coleridge Js.*

(b) 2 T. R. 391.

(c) 6 T. R. 748.

(d) 8 T. R. 396.

(e) 7 East, 121.

(f) 1 Wils. 63.

(g) Noy, 145.

(h) 2 Atk. 189.

(i) 1 Lev. 231:

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damages, notwithstanding the finding of the jury for the defendant upon his second plea. The declaration is in trespass for breaking and entering the close of plaintiff, and digging for and removing clay, sand, &c. The said second plea states, in substance, that before and at the said time &c. the defendant was the occupier of a certain tenement and premises, viz. a brick kiln, and that he, as such occupier, and all the occupiers for the time being of the said tenement, for the full period of thirty years before, &c. had and enjoyed as of right and without interruption, a right to dig, take and carry away from, &c., so much of the clay of the said close as was at any time required by him or them for the purpose of making bricks at his said brick kiln, in every year and at all times of the year, and justifies the alleged trespass accordingly. The replication takes issue on this plea. And the question is whether this plea can be sustained in point of law. And we are of opinion that, upon general principles and the authorities connected with the subject, it cannot.

It is observable that in all cases of a claim of right in alieno solo, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint and to any number, but such right is measured by the capability of the tenement in question to maintain the cattle during the winter; levancy and couchancy must be averred and proved.

Again, in the case of common of estovers, or a liberty of taking wood, called in the books house bote, plough bote and hay bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of the common of piscary. The nature of these rights is thus compendiously, but we believe accurately, given by Mr. Justice *Blackstone* (a): "These several species of commons do all originally result from the same

(a) 2 Comm. 35.

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necessity as common of pasture, viz. the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary and fire bote for his fuel; and house bote, plough bote, cart bote and hedge bote for repairing his house, his instruments of tillage and the necessary fences of his grounds;" that is, for a certain and definite purpose.

In some of these instances, the thing taken is more or less immediately renewable; and it would seem strange if in these such precision and certainty are required, but less in others, where the claim is larger, extending, as in the present case, to a right to disturb and remove a portion of the soil itself. Upon reference however to the authorities, we find that in cases not substantially distinguishable from the present, the same rule does, as in reason it ought to do, prevail.

In the case of *Wilson v. Willes* (a), the declaration was in trespass, for breaking and entering the close of the plaintiff, called Hampstead Heath, and digging and carrying away turf covered with grass, &c. Plea: that the locus in quo was parcel of a waste in the manor of Hampstead; that there had been from time immemorial divers customary tenements by copy of court roll; and the plea then alleged a custom for tenants of such tenements, "having a garden or gardens," parcel of the same, to dig turf for the making and repairing grass plots in such gardens every year, at all times of the year, *in such quantity as occasion has required*, and justified the taking accordingly. To this plea there was a general demurrer, and judgment was given for the plaintiff. In giving judgment, it was said by Lord *Ellenborough*, that a custom, however ancient, must not be indefinite and uncertain; that it was not defined what sort of improvement the custom extended to; that every part of the garden might be converted into grass plots; "that there was nothing to restrain the tenants from taking the

(a) 7 East, 191.

whole of the turbary of the common, and it resolved itself into the mere will and pleasure of the tenant."

In the case of *Peppin v. Shakespear and others* (a), the declaration was trespass for breaking, &c. the plaintiff's close. The plea stated the grant to the defendant *Shakespear* of a customary tenement of the manor of which the locus in quo was parcel, and a custom for the tenants thereof to have common of pasture and also *a liberty of digging sand, &c. for their necessary repairs*; there was then a justification of the breaking, &c. into the locus in quo, as parcel of the common for such purpose. The Court gave judgment for the plaintiff, on account of defects in the plea, in which judgment it was stated "that the defendant entered, &c. for the purpose of digging for and carrying away sand, &c. *for the necessary repairs of the defendant*. That no question could be made about any of the pleas (there having been others, which it is not necessary for us to notice), but *that* in which it was stated that the tenement was a messuage. And with respect to that they said that it ought to have been expressly alleged *that the house was in want of repair*, and that the defendants entered for the purpose of digging for and carrying away sand, &c. for that purpose."

It is true that these two cases respect the validity of a custom, but the reasons upon which the judgments are respectively founded have a strong bearing upon the degree of certainty and precision with which a claim of right generally, in order to be supported, ought to be described.

It remains now to be considered, whether the objection of vagueness and uncertainty be applicable to the plea in question or not. And we think that it is. The nature of the "tenement" (so called) a brick kiln, leads to no conclusion one way or the other as to the extent of the claim and demand upon the soil of the plaintiff. It may have been, at the time of the trespass, of any dimensions and capacity. It may have been, during the thirty years of

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alleged enjoyment, continually varying, and consequently the quantity of clay "required for the purpose of making bricks thereat" may have varied also. There is no limit. No amount of clay (measured by cart loads or otherwise) "required," nor number of bricks (estimated by hundreds or thousands) claimed to be made is given or attempted. What is it therefore but an indefinite claim, to take *all* the clay "from and out of the said close in which, &c.," or, in other words, to take from the plaintiff, the owner, the whole close?

We are of opinion, therefore, that the plea cannot be sustained, and that there must be judgment for the plaintiff for nominal damages, notwithstanding the finding of the jury for the defendant upon that plea.

Judgment for the plaintiff.

JAMES HAYWARD v. JOHN HEFFER and HENRY HALES  
the younger.

Monday,  
December 4th.

This Court will not order a bail bond, entered into in the Bankruptcy Court, under stat. 1 & 2 Vict. c. 110, s. 8, to be delivered up to be cancelled, upon affidavit that the defendant has rendered himself according to the condition of the bond.

*M. CHAMBERS* had obtained a rule to shew cause why the bond entered into by the defendant *Henry Hales* the younger and his sureties with the plaintiff should not be delivered up to be cancelled, the said defendant *Henry Hales* the younger having surrendered himself to the custody of the sheriffs of London, in execution upon a writ of *capias ad satisfaciendum*, issued by the plaintiff upon the final judgment signed in this cause, and having been subsequently removed by his sureties by *habeas corpus*, and committed to the custody of the Marshal of the Queen's Prison, in order to comply with the conditions of such bond, or that the sureties of the defendant, *Henry Hales* junior, have leave to render him to the custody of the said Marshal of the Queen's Prison, pursuant to the condition of the said bond entered into in the Court of Bankruptcy, and why the said

sureties should not have ten days time for that purpose and that in the mean time proceedings be stayed.

It appeared from the affidavits that the plaintiff in January, 1841, had filed an affidavit of debt on a promissory note of hand due to him, in the Court of Bankruptcy, under stat. 1 & 2 Vict. c. 110, s. 8, against the defendant *Henry Hales* the younger, and that in the month of February of the same year the said *Henry Hales* the younger, together with *Thomas Harper Bennett* and *Thomas Cope* as his sureties, entered into the bond required by the statute, conditioned for the payment by the said *Henry Hales* the younger of such sum of money as should be recovered against the said *Henry Hales* the younger and *John Heffer*, or against the said *Henry Hales* the younger, in any action which might have been, or which should be brought for the recovery of the alleged debt, together with the costs, or to render himself to the custody of the gaoler of the Court in which such action should have been or might be brought for recovery of the said debt, according to the practice of the Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment should have been recovered in such action. An action was afterwards commenced against the defendants, and tried in April, 1841, when a verdict was found for the plaintiff, and after a motion for a new trial, final judgment was signed on the 30th of June, 1842. Upon the 29th of October, the plaintiff issued a *capias ad satisfaciendum* upon the said judgment, directed to the sheriffs of London, commanding them to take the bodies of the defendants to satisfy the plaintiff 92*l.* and interest from the 30th of June then last. The writ was lodged the same day at the Secondaries Office with directions to be returned "*non est*," and the sheriff was acquainted that the plaintiff's object was to fix the bail. On the 14th of November, the writ of *ca. sa.* being returnable on the 15th, the defendant, *Henry Hales* the younger, surrendered himself into the custody of the sheriffs of London upon the said writ, and was taken to Whitecross Street Prison, and

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the sureties, in order to comply with the condition of the bond, obtained an habeas corpus cum causâ, directed to the sheriffs of London, under which the said *Henry Hales* the younger was by order of *Patteson J.* committed to the custody of the Marshal of the Queen's Prison, and on the 15th of November the sureties gave the plaintiff notice of the surrender and commitment of the said *Henry Hales* the younger in discharge of his bail. The defendant afterwards filed his schedule in the Insolvent Debtors' Court, and was admitted to bail on the 3rd of December, and again on the 11th of December committed, and on the 18th of February, 1843, obtained his final discharge from all debts due or claimed to be due from him on the 28th of November, 1842.

*Butt* shewed cause (a). The Court have no jurisdiction to interfere. They cannot order the bond to be cancelled upon affidavit that the obligors have fulfilled its conditions. It is true that *Coleridge J.* entertained an application to cancel a bond made under this statute in *Wilson v. Firth* (b). But there it was admitted that the bond had been satisfied by payment of a sum which had been accepted by the plaintiff in the action as a compromise for the debt and costs. In *Saunderson v. Parker* (c) a stay of proceedings only was ordered, the plaintiff having, after the surrender of defendant before judgment, lodged a ca. sa. with the sheriff for the purpose of fixing the sureties. But in the case of *Ridler v. Chapelow* (d) the Court of Exchequer decided that they had no authority to interfere. If the bond has in fact been satisfied, that would be a defence to an action upon it, and the sureties may plead it. But their present application is inconsistent; they say there has been a render according to the condition of the bond, and yet they ask to have time to render again. The surrender of the de-

(a) In Trinity Term last (June 15,) before Lord Denman C. J. *Patteson, Williams and Coleridge Js.*

(b) 9 Dow. P. C. 573.

(c) 9 Dow. P. C. 495.

(d) 1 Dow. P. C. N. S. 637.

defendant to the sheriffs, after a ca. sa. lodged with them to fix the sureties, is not in compliance with the condition of the bond; it is a caption by the sheriff, for which the plaintiffs are liable to pay him his poundage and fees. But the bond is to render to the custody of the gaoler of the Court in which the action is brought, according to the practice of the Court, or within such time, and in such manner, as the Court or any judge thereof shall direct, after judgment shall have been recovered in the action. This has not been complied with.

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Sir *F. Pollock* A. G., and *M. Chambers* contra. The sureties are placed in the same position as the bail formerly were. The practice of the Court as to render only applies to cases where the defendant is at large upon bail, and, when rendered, the defendant is in custody under the writ upon which he was originally taken: *Owston v. Coates* (a). If this were the case of bail, they would clearly be discharged by the defendant surrendering himself before the return of the writ. The ca. sa. is lodged with the sheriff, and entered in the public book, where to be returned "non est" is notice to the bail of the intention of the plaintiff to proceed against them, but, if the defendant render before or at the return of the writ, they are discharged: *Anonymous* (b). Here the condition of the bond has been complied with, and there has been a good render of the defendant to the custody of the gaoler of the Court in which the action was brought, according to the practice of the Court. The writ was returnable on the 15th of November, and the surrender to the sheriff is made on the 14th; he is thereupon immediately removed by habeas corpus, and committed by an order of *Patteson* J. to the custody of the Marshal of the Queen's Prison. This is a strict compliance with the terms of the second part of the condition, to render himself within such time and in such manner as any judgment of the Court should direct, after judgment should have been

(a) 10 Ad. & Ell. 193; S. C. 2 P. & D. 485. (b) 6 Mod. 239.



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recovered in the action. It is said that this may be pleaded, but the Court will aid the bail, and not put them to their plea.

*Cur. adv. vult.*

Lord DENMAN C. J.—In this case the Court had to consider whether they could order a bail-bond, under the 1 & 2 Vict. c. 110, to be given up to be cancelled. We think the Court has no power to make such an order.

Rule discharged.

Wednesday,  
 December 6th.

GARBETT v. VEALE and LOWE.

An execution creditor seized partnership property under a fi. fa. against one of the partners. Afterwards a joint fiat issued against the firm. The property was then sold "without prejudice" to the rights of the execution creditor, and the proceeds received by the assignees of the bankrupts.

*Held*, that, as the interest applicable to the execution would only be in the surplus coming to the execution debtor after

**ASSUMPSIT** for money had and received. Plea: non assumpsit, and issue thereon.

The cause was tried before *Tindal* C. J., at the Worcestershire Summer Assizes, 1842. It appeared that on the 19th April, 1841, the plaintiff had issued a fi. fa. on a judgment obtained in an adverse suit against one *William Reeves*. *W. Reeves* and his father were partners as coach builders. On the 29th April the sheriff seized the partnership property. On the 31st April a joint fiat in bankruptcy was issued against the firm upon an act of bankruptcy prior to the seizure; of this act of bankruptcy the plaintiff had no notice. The messenger under the fiat seized the goods of the firm, and continued in possession jointly with the sheriff until the 8th May, when the goods were sold under an arrangement that the execution creditor should not be prejudiced thereby. The proceeds of the sale were paid over to the defendants, who were appointed assignees under the fiat. It appeared that the partners were entitled to an equal share of the partnership profits and stock in

payment of the partnership debts, and must depend on the settlement of accounts, which a court of law is not competent to take, the execution creditor could not maintain an action for money had and received against the assignees.

trade; that *Reeves*, sen. was largely indebted to the firm, and that the estate was insolvent.

For the defendants it was objected that, although the partnership accounts appeared to be in favour of the execution debtor, still the separate creditor was only entitled to his debtor's interest in the estate, after payment of all the joint debts; that the claim, therefore, was a matter of account in equity, and that the action for money had and received could not be maintained. The learned Chief Justice directed the verdict for the plaintiff, and gave leave to the defendants to move to enter a nonsuit.

*R. V. Richards*, in the following Michaelmas Term, obtained a rule nisi accordingly.

*Talfourd* Serjt. and *W. J. Alexander* shewed cause (a). The rule of law is clear that the sheriff has a right to sell the partnership property, and that a moiety of the proceeds on sale belongs to the execution creditor. If there had been no partnership, the execution creditor would be entitled to the whole of the proceeds; the fact of partnership, therefore, merely reduces the amount to which he is entitled. It is immaterial to this case that there may be a different rule in equity. In *Parker v. Pistor* (b), where the authorities in equity, which may now be relied upon by the defendants, were also cited, the Court notwithstanding, where a *fi. fa.* had issued against one of several partners, refused to comply with the request of the partnership creditors to give the sheriff time to return the writ until an account could be taken of the claims upon the partnership property. Again, in *Chapman v. Koops* (c), a *fi. fa.* having issued against a single partner, who was indebted to the firm in a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, the Court refused to refer it to the prothonotary to inquire what was

(a) In Trin. Vac. last (June 29),  
before Lord Denman C. J., *Patten*  
son and *Williams* Js.

(b) 3 B. & P. 288.  
(c) 3 B. & P. 289.

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the defendant's interest in the effects seized. Lord *Alvanley* C. J. observed in his judgment in that case, "By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners. This the plaintiff has done, and we are desired to restrain his execution, because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But, if the other partners wish to take advantage of this circumstance, they ought to file a bill in equity against the vendee of the sheriff, or they may buy in the property when put up to sale. It has been said that the Court of Queen's Bench would suspend the plaintiff's execution until he consented to an account being taken before the Master; but I do not think we are authorised to take such a step in this case. Indeed I can hardly conceive a case in which we should be authorised so to do." So in *Burnell v. Hunt* (a), *Patteson J.* said in the course of the argument, "The proper course is for the sheriff to seize the whole and to sell the share of the execution partner, and the vendee will have to settle the matter in Chancery."

*R. V. Richards* contra. Wherever there is a separate execution against joint property, the execution creditor can take no more than the debtor himself had. Now the debtor in such a case is only tenant in common of property subject to all the joint claims upon that property. In such cases it is difficult to say what is the precise interest which the sheriff sells: per Lord *Tenterden* C. J. in *Burton v. Green* (b). But it appears that the "sheriff in a case of partnership must, however inconvenient it may be, sell the share of the defendant partner, and make the purchaser tenant in common with the other partners; and the pur-

(a) 5 Jur. 650.

(b) 3 C. & P. 306.

chaser must do the best he can to ascertain what interest there is:" per Lord Denman C. J. in *Holmes v. Mentze* (a). How then can money had and received lie, where it is uncertain what interest may be taken by the execution creditor, and the very form of action renders it peculiarly necessary to consider the equities of the case? To shew that a separate creditor of a partner has no right against the joint property beyond the share of such partner, upon a division of the surplus, subject to the accounts of the partnership, he cited *Taylor v. Fields* (b), *Dutton v. Morrison* (c), *Ex parte Hamper* (d), *Eddie v. Davidson* (e).

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*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—In this case the plaintiff had sued out a writ of fieri facias on a judgment obtained against *Reeves* the younger, who was in partnership with his father. The sheriff seized and got the property on the 29th April, 1841. A fiat in bankruptcy issued against both partners on the 30th of April, 1841, under which the messenger entered. The sheriff's officer afterwards withdrew by an arrangement, leaving his warrant with the messenger, who it was agreed should hold for the parties. The goods were afterwards sold, and the proceeds received by the assignees of the bankrupts, the defendants in this action. The plaintiff has declared for money had and received to his use, to which the defendants have pleaded *non assumpsit*. At the trial the verdict was taken for the plaintiff, subject to a motion for a nonsuit. According to the evidence, the father was indebted to the partnership in a large sum of money, which would be set against his interest in the partnership effects, after payment of all the partnership debts; but still the son's interest, applicable to the plaintiff's execution, would only be in the surplus, after

(a) 4 A. & E. 127; S. C. 5 N. 563.

(b) 4 Ves. 396.

(c) 17 Ves. 193.

(d) 17 Ves. 407.

(e) 2 Doug. 650.

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payment of the partnership debts, and must depend on the settlement of accounts, which this Court is not competent to take, except by consent of all parties, for which numerous authorities may be quoted. If the sheriff had sold *Reeves* the younger's interest under the *fiery facias*, the vendee would have been tenant in common with the assignees, and could not have maintained this action against them, unless the accounts had been settled, and a surplus had appeared after payment of the partnership debts, much less can an execution creditor maintain the action; he is not even tenant in common with the defendants; he has no legal interest in the goods. The rule for a nonsuit must be made absolute.

Rule absolute for a nonsuit.

END OF MICHAELMAS VACATION.

1844.  
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HILARY TERM,

IN

THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
 Lord DENMAN C. J. COLERIDGE J.
 PATTESON J. WIGHTMAN J.

In the Bail Court,

WILLIAMS J.

In re DAVIS.

AN order had been obtained (after argument before Mr. Justice Patteson in the Bail Court,) calling on the Incorporated Law Society to shew cause why Mr. *William Rees*, a practising attorney in Wales, should not make an affidavit stating that he was duly admitted an attorney of the Court of Great Sessions in Wales on the 6th day of April, 1830, and was practising in the said Court as an attorney on the 23rd day of July, 1830, the time of the passing of the act 11 Geo. 4 and 1 Will. 4, c. 70, and that his name was duly entered upon the roll of the Court of Queen's Bench, pursuant to the 16th section of the said act; and also stating the articles of clerkship between himself and *William Davis*; and why this should not be deemed a sufficient compliance with stat. 6 & 7 Vict. c. 73, s. 8, and why the Master should not enrol and register the said contract, and file the said affidavit so to be made as aforesaid, and make and

*Monday,
January 29th.*
 An attorney on the shilling roll, under 11 Geo. 4 and 1 Will. 4, c. 70, s. 16 (entitled to practise in the superior Courts in actions and suits against persons residing in Cheshire or Wales), is within the description of attorneys "practising in England or Wales" in 6 & 7 Vict. c. 73, s. 3, and consequently his articulated clerk is entitled to

be admitted and enrolled an attorney under the provisions of the latter act,

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sign a memorandum of the day of filing such affidavit upon such affidavit, &c.

The question was whether Mr. *Rees* was such an attorney, practising in England and Wales, within the meaning of 6 & 7 *Vict. c. 73*, s. 3, that Mr. *Davis* could be admitted an attorney from having served his clerkship with him.

The question turned on the following statutes :

By 2 *Geo. 2*, c. 23, (An Act for the better Regulation of Attornies and Solicitors), sect. 5, it was first enacted that no person should be permitted to act as attorney, &c., unless he should have been bound by contract in writing to serve as a clerk for and during the space of five years to an attorney duly and legally sworn and admitted "in some or one of the Courts hereinbefore mentioned." These Courts are enumerated in sections 1 and 3, and comprise, among others, those of the duchy and counties of Lancaster, Chester and Durham, and "his Majesty's Courts of Great Sessions in Wales."

By sect. 10 of the same act, attornies admitted in any Court might, with the consent in writing of an attorney of any other Court, and in his name, carry on proceedings in such other Court.

But by 34 *Geo. 3*, c. 14, s. 4, attornies of the Courts of Great Sessions (other than such as were admitted by virtue of contracts made before the act) were prohibited from carrying on proceedings in the Courts at Westminster either in their own names or those of other persons without being inrolled and admitted of such Courts.

By 34 *Geo. 3*, c. 14, s. 1, a stamp duty of 100*l.* was imposed on articles of clerkship to serve in order to admission as an attorney in the superior Courts, and a duty of 40*l.* on articles to serve in order to admission in the Courts of Great Sessions in Wales, the Courts of the counties palatine and others therein enumerated. (These duties were raised to a higher amount by subsequent acts ; 44 *Geo. 3*, c. 98, 48 *Geo. 3*, c. 149, and 53 *Geo. 3*, c. 184.)

By 9 *Geo. 4*, c. 49, s. 4, it was enacted that on payment

of 120*l.*, being then the amount of duty on articles of clerkship for admission in the superior Courts, articles of clerkship in the Courts of Great Sessions, Courts of the counties palatine, &c. might be stamped for admission of the parties in the superior courts: "and thereupon the person having so served shall be capable of being admitted an attorney or solicitor in any one or more of his Majesty's said Courts at Westminster."

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By 11 *Geo.* 4 and 1 *Will.* 4, c. 70, s. 14, the jurisdiction of the Court of Great Sessions in Wales was abolished, together with that of the Courts of the county palatine of Chester,

By sect. 16 it was enacted, "that all persons who, on or before the passing of this act, shall have been admitted as attornies, and shall then be practising in any of the Courts of Sessions or Great Sessions in the counties palatine of Chester or in Wales respectively, shall be entitled, upon the payment of one shilling, to have their names entered upon a roll to be kept for that purpose in each of the superior Courts at Westminster, and thereupon be allowed to practice in such Courts in all actions and suits against persons residing at the commencement of the suit within the county of Chester or principality of Wales; and that all persons having served or now actually serving as clerks to such attornies under articles, and who would otherwise be entitled to be admitted as attornies of the said Courts of the Great Sessions, may, on or before the expiration of six months after the passing of this act, be admitted as attornies of the said Courts at Westminster for the purpose of practising there in the like matters only, without payment of any greater duty than would be now payable by law upon their admission as attornies of such Courts of Great Sessions respectively.

By sect. 17, "all attornies and solicitors now actually admitted and practising in any of the said Courts of Sessions or Great Sessions may be admitted as attornies of the said Courts at Westminster in like manner as is now or may be

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hereafter prescribed for the admission of other persons as attornies therein, upon payment of such sum for duty, in addition to the sum already paid by them in that behalf, as shall, together with such latter sum, amount to the full duty required upon admission of attornies in the said Courts at Westminster: and that all persons having served or now actually serving under articles as clerks to such attornies or solicitors of any of the said Courts of Sessions or Great Sessions, may, at the expiration of their respective times of service, be admitted as attornies of the said Courts at Westminster, in like manner and upon payment of the like duty as if they had served such articles as clerks to attornies of the last mentioned Courts.

By 6 & 7 *Vict.* c. 73, s. 3, it is enacted, that, except as thereinafter mentioned, no person shall, from and after the passing of this act, be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, with a proviso, that every person who now is or shall hereafter be bound by contract in writing to serve as a clerk to a practising attorney or solicitor of the Court of Common Pleas of the county palatine of Lancaster, or the Court of Pleas of the county palatine of Durham respectively, for the term of five years, &c. shall be admitted and enrolled an attorney of the said last-mentioned Courts respectively as heretofore.

Mr. *William Rees* was admitted an attorney and solicitor of the Court of Great Sessions on the Carmarthen Circuit, on the 6th April, 1830, and was practising as such on the 23rd July, 1830, when the 11 *Geo.* 4 and 1 *Will.* 4, c. 70, passed. Mr. *Rees* was entered on the shilling roll under sect. 16, but not admitted to practise in the superior Courts under sect. 17.

Sir *F. Pollock* A. G. and *F. Robinson* shewed cause, and contended that the words "practising in England or Wales" did not include attornies on the shilling roll, who had not availed themselves of the provisions of 11 Geo. 4 and 1 Will. 4, c. 70, s. 17, so as to become entitled to practise in the superior Courts. The proviso in 6 & 7 Vict. c. 73, s. 3, shews that these words do not include all attornies: nor could it be contended that they included, for instance, attornies admitted in local courts of record.

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Sir *W. W. Follett* S. G., *Chilton* and *E. V. Williams* contra, relied on the words of the act, and also on 9 Geo. 4, c. 49, s. 4, shewing that, prior to the act which established the Welsh judicature, clerks who had served attornies practising in the Courts of Great Sessions were admissible to practise in the superior Courts on payment of the higher duty: *Ex parte Williams* (a).

LORD DENMAN C. J.—The Law Society have opposed this application with a view to obtain the opinion of the Court, whether clerks who have served with attornies on the shilling roll are admissible to practise in this Court: and, on review of the statutes, I am of opinion that they are admissible.

PATTERSON J.—Before the Stamp Acts, which imposed duties on articles of clerkship, clerks who had served attornies practising in the Welsh Courts might be admitted to practise in the superior Courts. The difficulty arose when those acts imposed different duties on admission into the Welsh and superior Courts respectively. But it was intended to be removed by 9 Geo. 4, c. 49, s. 4. That statute remains unrepealed. It still subsists in force as regards the Courts of the counties palatine. But in Wales the Courts to which it has reference have been abolished by 11 Geo.

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4 and 1 *Will.* 4, c. 70. That statute, in sects. 16 and 17, certainly seems at first sight inconsistent with the one just mentioned, and probably was passed in forgetfulness of it. But there is nothing in it to prevent, in direct language, clerks to attornies on the shilling roll from being admitted to practise in other courts. And stat. 6 & 7 *Vict.* c. 73, s. 3, seems clear. There is nothing to restrict the words "practising in England or Wales" so as to exclude attornies practising on the shilling roll. Clerks who have served them are in a different position from those who have served attornies practising in the Courts of the counties palatine only in this respect, that, inasmuch as there are now no Courts of Great Sessions, the stamp on the articles of the former must be the same with that on the articles of clerks who serve attornies in the superior Courts: whereas the latter are subject only to the smaller duty, unless they choose to be admitted in the superior Courts, in which case they must pay the larger. It would be hard if gentlemen who have practised ever since the 11 *Geo.* 4 and 1 *Will.* 4 on the shilling roll, should be deprived of the power of taking articted clerks, for it would come to that.

COLERIDGE and WIGHTMAN Js. concurred.

Rule absolute.

Wednesday,
January 31st.

SMITH v. DICKINSON.

A certificate for speedy execution to issue "for the sum recovered by the verdict" includes costs as well as damages.

ASSUMPSIT. The action was tried at the York Spring Assizes, 1843, before Mr. Justice *Wightman*. Verdict for the plaintiff, damages 32*l.* The learned judge certified as follows: "I certify that execution ought to issue on the

When, therefore, a judge had so certified for the plaintiff in an action of *assumpsit*, and the plaintiff issued a *capias* for the damages only: *Held*, that he could not obtain a second *capias* for the taxed costs.

13th March next for the sum recovered by the verdict." The plaintiff taxed costs and signed judgment. He then issued a ca. sa. for the amount of 32*l.* only, that sum being mentioned in the body of the writ, and indorsed upon it. The defendant was taken on this ca. sa., paid the 32*l.* and was discharged. Another ca. sa. was afterwards obtained by the plaintiff for the costs, and the defendant again taken. *J. Addison* obtained a rule for the discharge of the defendant, on the ground of his having been already arrested for the same debt, and the defendant was discharged accordingly; but it appeared that this rule had been obtained under the erroneous impression that the second ca. sa. was issued for the whole sum, both damages and costs.

Erle subsequently obtained a rule to shew cause why execution should not issue for the costs, against which

J. Addison now shewed cause, and contended that the original execution ought to have issued both for damages and costs, the costs following as incident to the verdict, on the usual form of certificate. The words of the act, 1 *Will.* 4, c. 7, s. 2, are, "that it shall be lawful for the judge before whom any issue, &c. shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify under his hand on the back of the record, at any time before the end of the sittings or assizes, that it is his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject or not to any condition or qualification; and in case of a verdict for the plaintiff, then either for the whole or any part of the sum found by such verdict." When the judge certifies under this act for the whole sum, the costs follow the certificate, and become part of the judgment debt, and execution must therefore issue for both, upon the principle that "if a *capias* be executed, that is in law sufficient for the whole debt, for *corpus humanum non*

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recipit æstimationem, so as if you take it at all, you must take it for the whole debt:" *Foster v. Jackson* (a).

Erle contrà. The plaintiff could not issue an execution for costs on this certificate. "The sum recovered by the verdict" means the 32*l.* awarded by the jury by way of damages; no other sum is mentioned in the verdict; and in the same manner it was understood by the parties, namely, that the immediate execution was limited to the damages, and that the costs were to be obtained in the usual time afterwards.

LORD DENMAN C. J.—The case is fairly stated on the part of the plaintiff; but in our opinion the result is against him. The judge has certified for the sum recovered by the verdict. The argument for the plaintiff is, that this excludes the costs. I think it includes them, unless the judge specifically excepts them.

PATTERSON J.—I do not say it is not in the power of the judge who tries the cause to prevent the plaintiff from taking out execution for costs. But when his certificate is "for the whole sum recovered by the verdict," that, in *assumpsit*, is for the damages and 40*s.* costs; and in the evident contemplation of the statute, the costs of increase follow.

COLERIDGE and WIGHTMAN J*a.* concurred.

Rule discharged.

(a) Hobart, 59.

**THE QUEEN v. THE GREAT WESTERN RAILWAY
COMPANY.**

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*Wednesday,
January 31st.*

IN this case a rule had been made absolute for a mandamus to the company to pay the sum of 2500*l.* to the prosecutors, as compensation for the tolls of Maidenhead Bridge, under a special clause in their act, (5 & 6 *Will. 4.* local and personal, c. 107, s. 230.) The company made no return to the mandamus, and paid the money. In Michaelmas Term a rule was applied for by the prosecutors, calling on the defendants to shew cause why the defendants should not pay the costs of the rules and writs, and was discharged, on the ground that the affidavit was wrongly intituled. It was intituled, "The Queen against the *Directors* of the Great Western Railway Company;" and in the body of the affidavit it was recited, that "an application had been made in Easter Term last for a rule to shew cause why a writ of mandamus should not issue, commanding the directors of the Great Western Railway Company" to pay the said mayor, &c. the aforesaid sum.

The affidavit having been amended in both these particulars and resworn, a fresh rule nisi was obtained on the part of the prosecutors, against which

Sir *W. W. Follett* S. G. now shewed cause. The general rule is, that where a party applying for a mandamus or certiorari fails from incompleteness in his affidavits, he will not have a writ granted on fresh affidavits supplying the defect: *Reg. v. Manchester and Leeds Railway Company* (a). There is an exception to that rule, where the defect is only in the jurat or title of the affidavit: *Rex. v. Justices of Warwickshire* (b); but here there is also a defect in the body of the affidavit, the defendants being there also wrongly described. The Court then called on

Where a rule to pay the costs of a mandamus has been discharged on the ground that an affidavit on which it was moved is defectively intituled, the Court will hear a fresh application, but not where the defect of form is in the body of the affidavit.

Where, therefore, such an affidavit was wrongly intituled, "The Queen against the *Directors* of the Great Western Railway Company," instead of "The Queen against The Great Western Railway Company," and the affidavit at the beginning recited that a mandamus had been obtained "against the directors of the company," and the rule had been discharged, the Court refused to grant a fresh application, the same affidavit being

(a) 8 Ad. & El. 413; S. C. 3 N. & P. 439. (b) 5 Dowl. P. C. 382.

used with these defects amended.

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Sir *F. Pollock* A. G. and *H. Hill* contrâ. The defect in the body of the affidavit is altogether immaterial, occurring merely in a recital, which might be struck out altogether without impairing the sufficiency of the affidavit. It was quite unnecessary to amend it at all. The objection therefore is not merely of a technical kind only, but beside the question. The whole application was a nullity, and this is not to be regarded as a fresh application, but an original one. In *Sherry v. Oke* (a), Mr. Justice *Patteson* granted a fresh rule to set aside an award, where the first had been discharged in consequence of defects of form, not in the title, but in the body of the affidavits.

LORD DENMAN C. J.—I think it is safest to adhere to the general rule. Where the objection is simply to the form in which the affidavit is sworn, so that the same affidavit being re-sworn will serve on the second occasion, there a fresh rule will be granted: but, if it be necessary to alter the body of the affidavit in any degree, it is no longer the same, and the Court will not inquire into the amount of the alteration. If the Court were to rule otherwise, a question would be raised on every defective affidavit, whether the defect were so material in its nature as to preclude a fresh application or not.

PATTESON J.—It is best to lay down a general rule, and adhere to it. I am inclined to think I was wrong in allowing the first application in *Sherry v. Oke* (a), the rule, however, was discharged ultimately.

COLERIDGE and WIGHTMAN Js. concurred.

Rule discharged, without costs.

(a) 3 Dowl. P. C. 349.



1844.

Tuesday,
January 30th.

HOLFORD v. JOHN HANKINSON and another.

TRESPASS *quare clausum fregit*. Fifth plea: that long before and at the said several times when, &c., one *Robert Hankinson* was and still is the occupier of a certain tenement and premises with the appurtenances, called the Horse and Jockey, contiguous and next adjoining to the said close in which, &c. And that he the said *R. Hankinson*, whilst such occupier as aforesaid, and all other prior occupiers of the tenement, for the full period of twenty years next before the commencement of this suit and before either of the said times when, &c., have had, used and *actually enjoyed without interruption, and of right ought to have had, used and actually enjoyed without interruption, and R. Hankinson, at the said several times when, &c., of right ought to have had, used and actually enjoyed without interruption, and still of right ought to have, use and actually enjoy without interruption, for himself and themselves, and his and their servants, farmers and tenants, occupiers of the tenement, a certain way to pass and repass on foot from a certain common highway, &c. into, through, over and along the close in which, &c., unto and into the tenement of R. Hankinson, and so from thence back again unto, into, through and over and along the close in which, &c. unto and into the common highway at all times of the year, at his and their free will and pleasure as to the tenement of R. Hankinson with the appurtenances belonging and appertaining. Justification under the above mentioned right of way. Verification, &c.*

A plea in trespass alleging that defendant and all other prior occupiers of a certain tenement, for twenty years next before the commencement of the suit, have had, used and actually enjoyed without interruption, and of right ought to have had, used and actually enjoyed, &c. a way through the locus in quo, *held* bad after verdict, as the actual enjoyment was not alleged to have been had under the right claimed, and the enjoyment therefore was not shewn to be "as of right," according to stat. 2 & 3 Will. 4, c. 71, s. 5.

Replication: that *R. Hankinson*, and all other prior occupants of the tenement mentioned, for the full period of twenty years next before the commencement of this suit, did not have, use or actually enjoy the way in the plea on that behalf mentioned as to the tenement of *R. Hankinson* with the appurtenances belonging and appertaining, in manner and form, &c. Conclusion to the country.

Issue thereon.

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The defendant obtained a verdict on this issue at the Liverpool Spring Assizes, 1843.

Knowles in the following Easter Term obtained a rule nisi to enter judgment for the plaintiff non obstante veredicto, or for a repleader, on the ground that the plea did not allege that the enjoyment of the way had been had as of right, according to the Prescription Act, 2 & 3 Will. 4, c. 71, s. 5, so that the alleged right and the alleged enjoyment were not connected together.

Wortley and *W. H. Watson* now shewed cause. The plea alleges that the way has for twenty years been enjoyed as to the tenement of *R. Hankinson* belonging, and the replication denies that the way has for twenty years been enjoyed as to the said tenement belonging. Under this issue therefore it must be taken, after verdict, to have been proved that the enjoyment has been actually had as of right for the requisite period. The Prescription Act has not created any new right, but was passed chiefly for the purpose of relieving the consciences of the jury: *Bright v. Walker*(a). They then referred to 1 *Wms. Saund.* 228, n. (1), and *Jackson v. Pesked*(b) and *Clark v. King*(c), to shew that the objection was cured by verdict, as the plea had merely stated title defectively, and not a defective title: that the plea might perhaps be ambiguous, and that an ambiguity was always cured by verdict, as the ambiguous expression must afterwards be taken to have been used in that sense which would sustain the verdict: *Lord Huntingtower v. Gardiner*(d), *Avery v. Hoole*(e); in which last case a declaration that "defendant had used a gun, being an engine to kill and destroy game," without averring that he had used it for the destruction of game, was taken, after verdict, to mean that he had so used it, because "the use must have been proved at the trial, or the verdict could not have been found for the plaintiff."

(a) 1 C. M. & R. 211.

(b) 1 Mau. & S. 234.

(c) 3 T. R. 147.

(d) 1 B. & C. 297; S. C. 2 D. & R. 450.

(e) Cowp. 843.

Knowles and *Tomlinson* contra were not heard.

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LORD DENMAN C. J.—The Prescription Act gives a new form of plea. A party may, if he prefer it, recur to the old form of plea. But, if he adopts the new form, he must follow the words of the act. The defendant has not done this. Every thing alleged in this plea may have been found for him, and yet he may have no defence. It is said the fault in the plea is a mere ambiguity. I think there is no ambiguity. The defendant by the language of his plea seems rather to express his regret that he had not enjoyed the way as of right.

PATTESON J.—The act gives a new form of plea, and makes it sufficient to “allege the enjoyment as of right.” If a party chooses to take advantage of this section, he must use the very words. This case illustrates the very distinction in *Jackson v. Pesked* (a) and other cases. This is the statement of a defective title, and not a title defectively stated.

COLERIDGE J.—This is a statement of a defective title, for every thing in the plea may be truly stated to the satisfaction of the jury, and yet the jury may not have been satisfied that the way was ever actually used as of right.

Rule absolute.

(a) 1 Mau. & S. 234.

HALL v. The Mayor, Aldermen and Burgesses of the
Borough of SWANSEA.

Tuesday,
January 26th.

ASSUMPSIT for money had and received, work done, and on an account stated.

Where a borough corporation, under a claim that a

particular office was vacant, or that it had been abolished by the Municipal Corporation Act, had for some years wrongfully received the fees, amounting to upwards of £600L., payable to the holder of such office, *held* that indebitatus assumpsit for money had and received might be brought against the corporation; for, as it would be absurd to suppose that a corporation would contract under seal to refund money which they claimed to be their own, the necessity of the case required such a remedy.

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Plea: non assumpsit and issue thereon.

The action was brought to recover the amount of certain tolls, dues and keelage, payable to the plaintiff as the layer keeper of the river Tawe at Swansea, from the 1st January, 1837, to the commencement of this action.

The cause was tried before *Maule J.*, at the Glamorgan-shire Spring Assizes, 1843, when a verdict was found for the plaintiff, damages 1000*l.*, subject to the opinion of the Court upon a case.

The case among other things stated the following facts: The plaintiff claimed for twenty years to have been layer keeper of the port of Swansea, duly presented by the court leet of the manor and borough of Swansea, and appointed by the steward of the Duke of *Beaufort*, the lord of the said manor and borough, and contended that in virtue of such appointment he was entitled to certain tolls on shipping entering the port of Swansea. Since 1836 the amount received for these dues has been paid by the receiver to the treasurer of the corporation of Swansea, instead of to the plaintiff, and for the recovery of the amount so paid this action is brought.

The ancient duties of the layer keeper were to keep the layers or beds of the shipping free from obstacles and in a proper state, but these duties have been merely nominal since the appointment of a harbour master under stat. 31 *Geo. 3*, c. 83.

The mode of appointing the layer keeper was as follows: It has been the custom from time immemorial for the stewards of the lords of the seignior of Gower (a district of the county of Glamorgan), who are also lords of the borough and manor of Swansea, which is within the seignior, together with the port reeve of the borough of Swansea, to hold annually two leet and baron courts for the borough and manor of Swansea, which borough and manor are co-extensive.

The jury of these courts are composed of aldermen, burgesses and residents.

At one of these courts it has been the custom to appoint the layer keeper. Two names are presented by the homage to the duke's steward and the steward elects one of them. The port reeve of the borough usually sat with the duke's steward, but took no part in these proceedings.

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The layer keeper's oath of office was to execute the office, &c. for the year ensuing, and until another should be chosen in his stead, or until he should be lawfully discharged.

The plaintiff was appointed in 1822, and was annually appointed until 1836. He was also appointed in 1836, but the mayor protested against the appointment.

In 1838 the duke's steward attended at the town hall for the purpose of holding a leet, but was prevented by the mayor, by whose orders the doors of the hall were locked, in consequence of which the steward, in the vestibule of the hall, adjourned the court till further notice, and forbore to hold courts till 1842, when he again resumed them. At the court of that date the plaintiff was re-presented by the homage and re-appointed and sworn in by the steward, the then mayor sitting with him as the port reeve used to do.

By the 30th section of stat. 31 Geo. 3, above mentioned, the powers of the layer keeper are expressly reserved. By the 64th section the royalties, rights, &c. of the Duke of Beaufort and the future lords are saved.

A clerk and receiver was appointed under this act; and has collected and continues to collect the tolls, &c., who, until 1836, has paid over to the layer keeper his proportion.

In 1836 a committee of inquiry, appointed by the town council, reported to the town council that the appointment of layer keeper should be vested in the corporation, and that 5l. per cent. on the revenue should be allowed for its collection; and this report was acted on by the town council, and from the 1st January, 1837, the receiver appointed by the corporation paid to the treasurer of the borough the dues of the layer keeper. The whole amount so paid to

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the treasurer, from the 1st January, 1837, to the 31st December, 1842, was 629*l.* 19*s.*

The defendants contend, 1. That the office of layer keeper was an annual office, and that the plaintiff has not been duly re-appointed since 1835.

2. That the plaintiff, at the time of the passing of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), was an executive officer in the borough of Swansea, and that he was not re-appointed according to the provisions of the said act.

3. That the right of action above set forth by the plaintiff cannot be tried as against these defendants in the form of *indebitatus assumpsit*.

4. That, inasmuch as the defendants set up a title to the tolls in question, such title cannot be tried in an action on the *indebitatus* count for money had and received.

It is agreed that the Court shall be at liberty to draw all such conclusions and inferences from the evidence as the Court shall think a jury ought to have done.

If the Court shall be of opinion that the plaintiff is entitled to recover from the defendants the amount of layer keeper's dues so received by the town council since the 31st December, 1836, or any part thereof, then the verdict is to stand entered for the plaintiff for such amount or such part; but, if the Court shall be of a contrary opinion, then a nonsuit is to be entered, or a verdict for the defendants, as the Court shall direct.

W. M. James for the plaintiff. The only question argued of general importance was, whether *indebitatus assumpsit* would lie against the corporation. On this point he cited *Beverley v. The Lincoln Gas Light and Coke Company* (a), and *Church v. The Imperial Gas Light and Coke Company* (b).

(a) 6 A. & E. 829; S. C. 2 N. & P. 283.

(b) 6 A. & E. 846; S. C. 3 N. & P. 35.

Erle contra. Indebitatus assumpsit will not lie against the corporation on an implied contract by them to repay tolls which they have received under a claim of right. The cases relied upon by the plaintiff are exceptive cases, shewing only that a corporation can contract, without seal, for certain given purposes essential to their existence, or with respect to small matters of frequent occurrence. A corporation cannot appoint an attorney except under seal: *Arnold v. Mayor, &c. of Pool* (a); nor contract, except under seal, to pay a sum of money for the making of improvements within the borough: *Mayor, &c. of Ludlow v. Charlton* (b).

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W. M. James in reply. The effect of the authorities is, that assumpsit lies against a corporation whenever the necessity of the case requires it. He then cited *De Grave v. Mayor, &c. of Monmouth* (c). He also cited *Yarborough v. The Governor, &c. of the Bank of England* (d), to shew that if the corporation had converted the plaintiff's goods they would be liable in trover, and, consequently, in an action for money had and received for the proceeds if they sold the goods.

LORD DENMAN C. J.—This is an action brought by the layer keeper against the corporation of the port of Swansea, to recover the fees of his office, which have been received by the corporation for several years past. The office is an ancient office, and it appears by the oath of office that the plaintiff undertook to execute it until his successor should be appointed or he (the plaintiff) should be lawfully discharged. I think the case discloses sufficient evidence of his continuing in office until the present time, unless something has occurred to determine his tenure of it. I think the plaintiff was properly appointed, although the port reeve did not join in the appointment. Then it is said that the

(a) 5 Scott, N. R. 741.

(b) 6 M. & W. 815.

(c) 4 C. & P. 111.

(d) 16 East, 6.

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office has been abolished by the Municipal Corporation Act. If the corporation had met together and come to a resolution that the office was useless and should be discontinued, the question might have arisen. But the corporation have received the fees of the office, and cannot say that the office continues for the purpose of receiving the fees, and that it is abolished for the purpose of retaining them against the plaintiff. (His Lordship then adverted to the stat. 31 Geo. 3, to shew that the office was continued by that act.)

With regard to the maintenance of this action of assumpsit against the corporation, I think the two cases in this Court are conclusive in the plaintiff's favour, at the same time I think in the other cases cited the Courts were quite right. In the case in the Exchequer the defendant must have known that it would have been proper for the corporation to affix their common seal to the contract on which he relied, so as to manifest it to be the deliberate act of the corporation. Still more in the other case, which was in the Common Pleas, the corporation might fairly say to an attorney who sought to fix them with a large sum due for professional services, "You, who know in what manner a corporation ought to contract, should have taken care that the appointment of you by the corporation as their attorney was properly executed." I think the only principle applicable to this point is the necessity of the case; that is the only rational ground on which any exception can be put to the ordinary rule, that the will of a corporation must be expressed by its common seal. Apply that principle here. If the corporation have chosen to apply the plaintiff's money to their own use, it is absurd to suppose that they would engage under the common seal to repay him. It is not correct to say that the plaintiff's right of action in this form results from contract; it results from that wrongful act of the corporation which has created the necessity of bringing such an action.

PATTESON J. (after disposing of the questions raised against the plaintiff's title.)—The corporation have received the plaintiff's money, and when he seeks to recover it they say they have entered into no engagement under their common seal to refund it. We certainly cannot allow such a defence to prevail, unless we are compelled to do so. No case very like the present has been actually decided, but I think it is within the principle of *Smith v. The Birmingham and Staffordshire Gas Light Company* (a) and *Yarborough v. The Governor, &c. of the Bank of England* (b); for it would be absurd to say that trover would lie against a corporation for converting goods, and that money had and received would not lie for converting the proceeds of those goods. The true ground in such cases is the necessity of allowing the form of action. It would be the height of absurdity to suppose that a corporation would covenant to refund money which they claim to have received rightfully as their own money.

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COLERIDGE J.—I am entirely of the same opinion. In a case like this, where principle and authority enable us to say the action may be maintained, we certainly ought to be ready to act up to the law though not to strain it. It is found that the corporation in this case made a resolution to receive the money, and the money must be supposed to be now in the corporate chest. If the sum had been small, the counsel for the defendants would probably not deny that the action might be maintained, for he puts the law of the case upon a question of magnitude. But on what principle can the difference in amount be held to make any difference in a case like this? How can a corporation be expected to seal a bond for the repayment of money which they say is their own? The principle on which we decide this case is to be found in *Yarborough v. The Governor, &c. of the Bank of England* (b). That case shews

(a) 1 A. & E. 526; S. C. 3 N. & M. 771.

(b) 16 East, 6.

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that trover would lie, whatever might be the value of the property converted by the corporation. Can it then consistently be maintained that, if the corporation sell the converted property, money had and received will not lie for the proceeds?

WIGHTMAN J.—I fully agree. There is no doubt that the corporation have received money which belongs to the plaintiff. The only question in my mind was, whether the money could be recovered in this form of action. It has been decided that assumpsit may be brought against a corporation in certain cases, whether the consideration be executed or executory. On the other hand, it is said there are many cases even of executed consideration where assumpsit could not be maintained, and that it is essential to the maintenance of such form of action, that the contract in question relate to some matter of daily recurrence, or of small moment or of urgent necessity. Now the reason founded upon necessity may fairly be resorted to here, for unless we allow this action to be brought, I do not see what remedy the plaintiff can have. In the case in the Exchequer there was no reason why the corporation should not, if they had thought proper, have sealed the contract with all formality, and it might be said to be the party's own fault that he did not require the contract to be sealed. But here the plaintiff has no opportunity of procuring the corporate seal, for the corporation have taken his money and say it is theirs. The analogy furnished by the cases of trover against corporations is also strongly in favour of the maintenance of this action.

Judgment for the plaintiff.



1844.

Wednesday,
January 31st.

HOLROYD and another v. REED and another.

DEBT for goods sold, work done, money lent, money paid, and money had and received. Pleas: never indebted, payment and set-off. The plaintiffs having become bankrupts after the plea, the defendants pleaded the bankruptcy. To this plea the plaintiffs demurred specially. A rule was obtained, calling on the plaintiffs to shew cause why further proceedings should not be stayed, or why the defendants should not be at liberty to amend their plea of *puis darrein continuance*, or withdraw such plea and replead the first set of pleas; and why the plaintiffs should not give security for costs.

A plea of the bankruptcy of the plaintiffs, pleaded *puis darrein continuance* (see rule H. T. 4 *Will.* 4, c. 2) is amendable.

Baines and *Pashley* now shewed cause, and contended, inter alia, that a plea in the nature of a plea *puis darrein continuance* cannot be amended, citing *Bro. Ab. Continuance*, 5; *Year Books*, 9 *Hen.* 6, 23, 9 *Hen.* 7, 9.

Martin contra, relied on *Lindo v. Simpson* (a).

Hance, on the same side, was not heard.

Per CURIAM (b).—We can see no reason why a plea *puis darrein continuance* should not be amendable.

Rule absolute for amending the plea, on payment of costs of the application and of the amendment (c).

(a) 2 *Smith*, 659.

(c) See *Hawkins v. Moor*, Cro.

(b) Lord Denman C. J., *Patte-son, Coleridge and Wightman* Js. Jac. 261.



1844.

Saturday,
January 27th.

A person committed to prison for further examination only, and not finally committed for trial, has no right to copies of the depositions under stat. 6 & 7 Will. 4, c. 114, s. 3.

Depositions should be signed by the magistrate and witnesses as soon as they are taken.

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KELLY on a former day in this term obtained a rule to shew cause why a mandamus should not issue to the defendant commanding him to deliver to one *Fletcher*, or his attorney, copies of the examinations of the witnesses respectively, upon whose depositions the said *Fletcher* from time to time and then stood committed to prison to the custody of the keeper of the Giltspur Street prison, pursuant to stat. 6 & 7 Will. 4, c. 114, "An Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney."

The prisoner had been charged before the lord mayor with felony. Numerous witnesses in support of the charge had been examined in the course of December and January last, and the prisoner at the conclusion of each day's examination had been committed to prison by the lord mayor for further examination. The depositions had not been signed by the lord mayor or by the witnesses.

The prisoner's attorney had offered to pay the charges allowed for such copies of depositions by the third section of the statute.

Sir *F. Pollock* A. G. and *R. V. Richards* now shewed cause. The statute (*a*), allowing a prisoner to have copies

(*a*) The first section enacts, "Whereas it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them, be it therefore enacted, &c. that, from and after the first day of October next, all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full

answer and defence thereto by counsel learned in the law, or by attorney in Courts where attorneys practise as counsel."

Section 3 is as follows:—"And be it further enacted, that all persons who, after the passing of this act, shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have on demand, (from the person who shall have

of the depositions against him, does not apply to a prisoner committed for further examination only and not for trial. The third section, which contains the provision applicable to this question, expressly applies to persons "committed for any offence." A person is not committed for any offence until he is finally committed for trial. Stat. 7 Geo. 4, c. 64, is in *pari materia*, and it is clear from that statute that depositions were not deemed to be complete until they should be ready to be returned into the Court at which the trial might take place; the title of the act "*To enable Persons indicted of Felony to make full Defence*," &c. clearly has reference to the time of trial.

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Kelly and Ballantine contra. The object of the act was to give the prisoner the opportunity of meeting the charge against him in every stage of the proceedings, and not merely at the time of trial. He is to be assisted in giving a full answer to all that may be alleged against him. There is nothing said about the time of trial. As soon as the charge is made before the magistrate the prisoner is put on his defence; and the consequences of commitment for trial are frequently, so far as regards the duration of imprisonment, much more severe than the punishment on conviction.

the lawful custody thereof, and who is hereby required to deliver the same,) copies of the examinations of the witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three-half-pence for each folio of ninety words: Provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made

is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged."

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As to the meaning of the word "commitment," it is obvious the word applies to every kind of commitment: 2 *Hale* P. C. cap. XIV. p. 120; *Davis v. Capper* (a). Stat. 7 Geo. 4, c. 64, s. 2, with respect to the mode of taking depositions, makes no distinction between one sort of commitment and another. If the depositions are not yet properly signed, the answer is that they ought to be. It is expedient that they should be signed as soon as taken, and that they should not be altered afterwards. If a deponent were to die before trial, his deposition, unless properly signed, would not be admissible in evidence. Witnesses might be tampered with after final commitment as well as after commitment for further examination, and therefore no objection can be made on that ground to the present application.

Lord DENMAN C. J.—This rule must be discharged. The preamble of the statute is clearly confined to defences at the time of trial. The terms "full answer and defence" would not be very appropriate with reference to the inquiry before the magistrate, who could have no power whatever to try the case. The words which raised some doubt in my mind were those in the third section, which provide that the accused party may "have on demand from the person who shall have the lawful custody thereof" copies of the examinations. The words "on demand," coupled with the words describing the situation of the person entitled to make the demand, viz. that he should be "committed to prison," created at first some difficulty in my mind. The applicant here has made a demand, and he is "committed to prison, but still he is not "committed to prison for any *offence*;" the consideration of his case is suspended, and he is committed merely for safe custody until more information is obtained. This power of commitment during the inquiry is one which it is necessary the justice should have, when enough has been disclosed to

(a) 10 B. & C. 32.

render further investigation proper and yet not enough to justify commitment for trial.

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PATTESON J.—I am of the same opinion. Although the preamble does not contain the word “trial,” yet the privilege of making full defence by counsel is clearly limited to the time of trial. But I found my judgment upon this, that the applicant is not now committed for any offence but for further examination only.

COLERIDGE J.—I am of the same opinion. And I think this question a very important one, for, if this case is within the act, the magistrate would have no discretion to withhold copies of the depositions, although by furnishing them he might sometimes defeat the purposes of justice, especially where many persons are implicated in a charge. The preamble appears to me to apply to the first two sections only, and the third looks like an afterthought. The words “full answer and defence” occur in the enacting part as well as the preamble of the first section, and the terms, as well understood in our law, apply to the time of trial only. That section expressly gives the privilege of full defence by counsel to “all persons *tried* for felonies.” But the question is upon the third section, and is a very short one—Is this applicant now committed for any offence? The person within the act is to have copies of examination “on demand;” and it appears, from the subsequent provision in case “*such* demand” shall not be made before trial, that the demand contemplated was a demand after final commitment and before trial. It could not be intended that a prisoner should be entitled to the copies where he is discharged.

WIGHTMAN J.—As this was a case of general importance I thought it better to grant the rule, but I also thought from the first that the third section did not apply to this case. The preamble contemplates the trial only, and

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though the third section does not expressly restrict the right to prisoners committed for trial, yet I think, both with respect to the preamble and to the expressions of the third section itself, that the present case is not within the statute. A commitment for further examination is not a commitment "for any offence," but is merely for the further examination of a person charged with an offence.

Lord DENMAN C. J.—It is proper to add that our judgment does not proceed at all upon the absence of signature to this case by the lord mayor and witnesses. It is the duty of the magistrate to sign the depositions and to have them signed by the witnesses as the case goes on.

Rule discharged.

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The QUEEN v. The Justices of LANCASHIRE. (a)
 (HOLYWELL, appellants, WARRINGTON, respondents.)

An order of removal was made October 5, suspended on the same day, and served October 14: *Held*, that the parish on which the order was served was not bound to appeal at a sessions commencing Nov. 3, inasmuch as the period of twenty-one days from the service of the order had not elapsed.

A RULE nisi had been obtained in Easter Term for a mandamus to the defendants to enter continuances and hear an appeal against an order for the removal of *Margaret Pugh* and her children from Warrington, in Lancashire, to Holywell, in Flintshire.

The order of removal, and an order of suspension indorsed upon it, were made on the 5th October, 1843, and served on the parish officers of Holywell on the 14th with notice of chargeability and examinations.

The next quarter sessions at which the business for the division of Lancashire in which Warrington is situate was

(a) Decided in Trinity Term 1843 (June 10).

Semble, that under sect. 79 of the 4 & 5 Will. 4, c. 76, a parish has twenty-one days after the service of an order of removal, to consider whether it will appeal or not; and that, therefore, as 14 days' notice must be given of the grounds of appeal, there are in all thirty-five clear days between the service of such order and the sessions at which it is necessary to appeal.

disposed of, commenced at Kirkdale on November 3 by adjournment; (the sessions having commenced at Lancaster according to 1 *Will.* 4, c. 70, s. 35, in the first week after October 11th, that is to say, in the present instance, on Monday, October 17:.) No appeal was made to those sessions, and the parish officers of Warrington moved to have their order confirmed, which was done. In December the paupers were removed. At the Epiphany Sessions, January 19, the parish officers of Holywell applied to try the appeal, having served notice and grounds on November 21, but the Court of Quarter Sessions refused to entertain the application.

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Cowling now shewed cause. Assuming that in the county of Lancaster the longest ordinary term of notice is usual (the actual practice not being disclosed by the affidavits), viz. fourteen days, there was still time for the parish officers of Holywell to appeal to the sessions held on November 3. And although the removal in this case took place in December, and might in the case of a common order be treated as the actual grievance: *Rex v. Justices of Cornwall* (a) and *Reg. v. Justices of Salop* (b), yet the case is otherwise with suspended orders; they are regulated by 49 *Geo.* 3, c. 124, s. 2, according to which act the time of the appeal is to be computed from the service of the order and not from the removal. The practice is not altered by the Poor Law Amendment Act: *Rex v. Justices of Suffolk* (c).

Unthank contra. It is not disputed that the time for appealing was to be reckoned from the service of the order, not the removal. But, by 4 & 5 *Will.* 4, c. 76, s. 79, twenty-one days must intervene from the service of the order before the removal; the parish has therefore this time to consider whether or not it will appeal; and then, by sect. 81, grounds of appeal must be served fourteen days

(a) 6 A. & E. 894.

(b) 6 Dowl. P. C. 28.

(c) 4 Ad. & El. 319; S. C. 5 N.

& M. 503.

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before the sessions. The appellant parish has therefore thirty-five clear days between the service of the order and the sessions. Nor is it necessary to enter and adjourn an appeal which there is no time to try: *Rex v. Justices of Devon (a)*. Besides, the sessions held on the 3rd November was an adjourned sessions only; its commencement was by statute on the 17th October, and therefore clearly before the time for appealing, as there were only three days between the service of the order and the 17th October. (On this point the Court gave no opinion.)

Lord DENMAN, C. J.—The parish to which a pauper is removed has twenty-one days to consider whether or not to appeal, and if it has determined to appeal, must furnish the removing parish with grounds of appeal fourteen days before the sessions; that is the effect of 4 & 5 Will. 4, c. 76, ss. 79, 81. To hold that the parish was bound to appeal before the expiration of both these periods, would be to take away a part of the twenty-one days which have been conceded to it for the purpose of deliberation. But, at all events, the period of twenty-one days had not expired in this case, as there were less than that number of clear days between the service of the order and the commencement of the adjourned sessions.

PATTESON, WILLIAMS and COLERIDGE, Js. concurred.

Rule absolute. (b)

(a) 8 B. & C. 640, (n.)

v. *Alverthorpe*), 1 New Sessions

(b) See *The Queen v. Justices of West Riding of Yorkshire (Stanley*

Cases, 445.



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The QUEEN v. The Town Council of LICHFIELD (a).

A RULE nisi had been obtained for a certiorari to remove into this Court two orders of the Town Council of Lichfield, dated the 7th April, 1843; the one for the payment of 165*l.* 9*s.* 1*d.* out of the borough fund to a late mayor, for the bill of costs, &c. for prosecuting certain defendants in a riot and assault committed against the said mayor in the execution of his duty as such; the other for the payment of 200*l.* and interest due from the council to Mrs. *Mallett*, and secured by a promissory note to her late husband. An injunction had been obtained on the 14th April, 1843, restraining the mayor, aldermen and burgesses from signing any order on the treasurer to make these payments, and the treasurer from paying them out of any property of the corporation till full answer, or till farther order of the Court of Chancery.

As to the first order, the following were the facts disclosed by the affidavits. A riot took place at the proceedings at the Municipal Revision Court before the mayor, *Robert Sharp*, in 1842. The mayor preferred a charge of riot and assault before the magistrates of the city of Lichfield against certain persons, who were bound over to appear at the next quarter sessions for that city. At those sessions a bill was preferred and found, and removed by certiorari at the instance of the defendants. It was tried before a special jury at the Stafford Spring Assizes, 1843. The defendants were acquitted, and no order made by the Court as to the prosecutor's costs.

On the 7th April, 1843, a meeting of the council was called by the town-clerk, with notice of the objects of it; when the following "resolution or order" was agreed to by a majority, and signed by the mayor for the time being.

An order by a town council for the payment out of the borough fund of law expenses incurred in prosecuting parties for riot and assault on the mayor in the execution of his duty, is illegal, there not having been any previous resolution of the town council authorising the incurring such expenditure.

A similar order for the payment of a debt secured by the mayor's promissory note, the sum having been borrowed for the purpose of paying debts of the corporation incurred since the passing of the 5 & 6 Will. 4, c. 76, is likewise illegal.

Such orders may be removed by certiorari and quashed, although existing only in the form of resolutions of the council entered in the minute book, and signed by the mayor only.

(a) Decided in Trinity Term last, June 10.

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"Friday, the 7th of April, 1843.—At a meeting and common hall of the council of this city this day held pursuant to appointment and notice, &c. (after stating who were present), it is agreed and ordered that the sum of 165*l.* 9*s.* 1*d.* be paid out of the borough fund to Mr. Alderman *Sharp*, late mayor of this city, in addition to any sums already paid to him on account of the mayor's salary, the above sum of 165*l.* 9*s.* 1*d.* being the amount of the bill of costs now examined and allowed by the council, consisting of the charges, fees and disbursements of Messrs. *Spurrier & Chaplin*, solicitors, Birmingham, loss of time and travelling allowances of prosecutor and witnesses, justices clerks' and court fees, and expenses in the prosecution of *James Burton*, *William Garton*, the younger, *George Walker* and *Alfred Eggington* for a riot and assault on the said *R. Sharp* on the 15th of October last, when in the execution of his duty as mayor of this city on the revision of the burgess lists; the information and complaint of the said *R. Sharp* against the three first-named defendants for the said alleged offence having been heard and inquired into on the 20th and 24th October last, before ten of the justices of the peace of the said city, by whom the said *R. Sharp* was bound over to prosecute, and those defendants to appear and answer at the ensuing sessions for the city of Lichfield; the said *R. Sharp* having also preferred an indictment at such sessions, which was found a true bill, and was moved by the defendants (after traversing) by certiorari to Stafford, and tried at the last assizes, when the defendants were acquitted."

As to the other order the facts were as follows:—After the date of the Municipal Reform Act, 5 & 6 *Will.* 4, c. 76, *Thomas Rowley*, at that time mayor, borrowed of *Thomas Mallett*, one of the then councillors, the sum of 200*l.*, for which he gave his promissory note, but no bond or obligation was given in the name of the body corporate. It appeared, however, that there had been a resolution of the council for borrowing this sum, and interest had been paid

on it from time to time by the town council out of the borough fund. It appeared that the money thus borrowed was not applied in discharge of any debts contracted by the corporation previously to 5 & 6 *Will.* 4, c. 78.

The following order or resolution was made at the aforesaid meeting in April, 1843, and signed in like manner. "It is agreed and ordered that the principal money and interest thereon due from this council to Mrs. *Mallett*, of this city, widow, and secured by a promissory note to her late husband, be paid."

The dissenting minority of the council had given notice of their intention to oppose the payment of both these sums as illegal.

It appeared that in 1838 part of the real property of the corporation had been sold (under the 5 & 6 *Will.* 4, c. 76, s. 94), and part of the proceeds were invested in exchequer bills; these by an order of the council were turned into money, which was placed by the treasurer to the account of the borough fund, to the amount of 735*l.*

The affidavits stated that the majority of the council threatened to enforce the order for the payment of these monies out of the borough fund. On the other hand, the affidavits in opposition stated that the two resolutions in question were not "orders in writing, signed by three or more members of the council," &c. under 5 & 6 *Will.* 4, c. 76, s. 59, but simply resolutions signed by the mayor, and entered in the minute book under sect. 69 of that act; that the treasurer would not therefore pay the monies upon them, but wait for regular orders; and that these resolutions could not be removed into this Court by certiorari or otherwise without either tearing them from the minute-book, or removing the minute-book itself.

Erle and *W. R. Cole* shewed cause. They cited *Reg. v. The Town Council of Stamford (a)*, *Reg. v. The Mayor, &c.*

(a) 4 Q. B. 900; S. C. nom. *Reg. v. Thompson*, after order brought up by certiorari, *post*, 497.

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of Bridgwater (b), Reg. v. Paramore (c), Attorney-General v. The Mayor, &c. of Norwich (d) Rex. v. Inhabitants of Essex (e), Rex v. Commissioners of Sewers for the Tower Hamlets (f), Arnold v. The Mayor of Poole (g), and Holdsworth v. The Mayor of Dartmouth (h).

F. V. Lee contra, cited *Reg. v. The Mayor, &c. of Leeds (i), Rex v. Bird (k), Stark v. The Highgate Cemetery Company (l), and Broughton v. The Manchester Waterworks Company (m)*. He was stopped by the Court.

LORD DENMAN C. J.—Without denying that it may be perfectly right for the town council to incur legal expenses for the purpose of protecting its officers in the execution of their duty, I think that the objection to the first order in this case must prevail, that there was no previous resolution of the council authorizing the expenditure. The council ought to have considered, first, whether the prosecution was one which ought to be undertaken and conducted at the expense of the corporation. This is a very easy requisite, which there can be no difficulty in performing. Then, as to the second order, that likewise is bad, inasmuch as the council has no right to pay in this manner, by borrowing money and thus charging the fund, debts incurred since the Municipal Corporation Act. The very enactment of 7 Will. 4 & 1 Vict. c. 78, s. 28, which authorizes them to borrow money for the payment of debts contracted before that act, seems to imply thus much, even if it were not otherwise clear. They must provide for such obligations as they go on out of the funds which come regularly to their hand.

(b) 10 A. & E. 281.

(c) 10 A. & E. 286.

(d) 2 Mylne & C. 406.

(e) 4 T. R. 591.

(f) 1 B. & Ad. 232.

(g) 4 M. & G. 860.

(h) 11 A. & E. 490; S. C. 3 P. & D. 308.

(i) 4 Q. B. 796.

(k) 2 B. & Ald. 522.

(l) 5 Taunt. 792.

(m) 3 B. & Ald. 1.

PATTESON J.—Under 5 & 6 *Will.* 4, c. 76, s. 92, the council may pay expenses “necessarily incurred” out of the borough fund. But in such a case the council are to determine by a vote what is “necessary;” not to incur the expense first and afterwards vote its payment. I likewise think the second order bad; the act referred to by Lord *Denman*, empowering corporations to borrow money to pay debts contracted before the act, would not have been necessary if such a payment as the present were lawful.

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WILLIAMS and COLERIDGE Js. concurred.

Rule absolute (a).

The orders were brought up and quashed accordingly without further opposition.

(a) See *Reg. v. Thompson*, post, 497.

The QUEEN v. MILNER and another.

J. ADDISON moved for a rule calling upon the defendants to shew cause why one or more information or informations, in the nature of a quo warranto, should not be exhibited against them, to shew by what authority they respectively claimed to be burgesses of the Borough of Richmond, in Yorkshire. He called upon the persons against whom the application was directed to shew cause in the first instance, as ten days' notice had been given to them under stat. 6 & 7 *Vict.* c. 89, s. 5 (b).

Tuesday,
January 30th.

A burgess is not a “corporate officer” within sect. 5 of stat. 6 & 7 *Vict.*, and therefore cannot be called upon to shew cause in the first instance against a rule for an information in the nature of a quo warranto.

(b) That section is as follows: —“Whereas it is expedient to render certain proceedings by way of quo warranto and mandamus, so far as they affect corporate offices in boroughs, more summary and expeditious; be it therefore enact-

ed, that from and after the passing of this act in all cases of intended application to the Court of Queen's Bench, either for a mandamus to proceed to an election of any corporate officer or officers in any of the aforesaid boroughs, or for any

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 MILNER.

Knowles contra contended that he was not obliged to shew cause in the first instance, as the section applied only to "corporate officers," and the present rule was applied for against burgesses, who are merely the class out of which corporate officers are elected.

J. Addison in reply. A burgess is a corporate officer, and it is on that very ground that quo warranto lies against a burgess.

Lord DENMAN C. J.—A burgess is not a "corporate officer" within this act. That is no reason why quo warranto should not lie against him as the holder of a franchise. But the persons contemplated by the section of the act are those who are connected with the governing part of the corporation.

PATTESON and COLERIDGE Js. concurred.

Rule nisi accordingly.

information in the nature of a quo warranto against any person *claiming to be a corporate officer* of and in any of the said boroughs, it shall be lawful for the party intending to make such application to give notice in writing thereof to the party to be affected thereby at any time not less than ten days before the day in the said notice specified for making such application, in which notice shall be set forth the

name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time to deliver with such notice a copy of the affidavits whereby the application will be supported, and thereupon it shall be lawful for the said last-mentioned party to shew cause in the first instance against such application."



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Saturday,
January 20th.

The QUEEN v. THOMPSON.

IN Trinity Term last a rule was made absolute in this Court for a certiorari, under stat. 7 *Will.* 4 & 1 *Vict.* c. 78, s. 44, to remove a certain order of the town council of the borough of Stamford, directing 197*l.* 19*s.* 3*d.*, the amount of the expenses incurred in defence of certain constables of the borough against a certain indictment for an assault, to be paid out of the borough fund.

The assault in question was alleged to have been committed by the constables while they were acting as constables in the apprehension of a person of the name of *Cook*.

The order having been removed into this Court,

Whitehurst now shewed cause against a rule for quashing the order, and contended that the payment in question was a legitimate application of the borough fund by the town council, under sections 6 and 92 of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76). [*Coleridge J.* The 92d section does not say who is to apply the fund, but merely mentions the purposes to which it is to be applied.] Unless the watch committee alone are authorised to direct such a payment under section 82, it may properly be directed by the town council, who are the governing body of the borough.

A. J. Stephens contra. The watch committee alone have jurisdiction to direct such a payment, under the express words of section 82, which enacts, "That the treasurer of every borough appointed under this act shall pay to the constables of such borough appointed under this act such salaries, wages and allowances, and at such periods, as the watch committee for such borough shall, subject to the approbation of the council, direct, and the council shall order to be paid also any extraordinary expenses which such persons shall appear to have necessarily incurred in apprehending

The town council has no power under the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), to order the expenses of an indictment against a borough constable to be paid out of the borough fund.

But *semble*, the watch committee might, under sect. 82, make such an order, subject to the approbation of the council.

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offenders and executing the orders of any justice of the peace having jurisdiction within such borough, such expenses having been first examined and approved by such justice; and the said treasurer shall also pay such further sums as the watch committee shall, subject to the approbation of the council, award to any of the persons belonging to the said constabulary force, as a reward for extraordinary diligence or exertion, or as a compensation for wounds or severe injuries received in the performance of their duty, or as an allowance to such of them as shall be disabled by bodily injury received, or shall be worn out by length of service, and all other charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this act." The payment in question would come under the words "all other charges" for the purpose of the constabulary force, in the concluding part of the section.

Lord DENMAN C. J.—I am of opinion that this order cannot be supported. It is true that section 92 gives large powers to the town council, but it does not interfere with the particular provisions as to particular powers in other parts of the act. The 82d section gives particular directions with respect to charges like those now under consideration. We agree that, under the last part of this section, these charges might have been directed to be paid by the watch committee, subject to the approbation of the town council. It may appear that this is a technical objection, but I think it of importance that each body of the corporation should know the extent of its own power and responsibility, and should not go beyond it.

PATTESON J.—I entirely agree. If an order had been made for payment of these expenses in the first instance, it should have been done under the 82d section.

COLERIDGE J.—The 82d section seems drawn with re-

ference to the 76th, under which the town council appoints the watch committee, and the watch committee appoints the constables. Then comes the 82d section, which says, first, that the watch committee shall direct payment of the salaries to the constables, subject to the approbation of the council; then, secondly, the council (without the interference of the watch committee) shall order payment of the extraordinary expenses incurred by constables in apprehending offenders, and executing the orders of any justice, such expenses having been first examined and approved by such justice; thirdly, the watch committee are put forward again as the moving body, and they may, subject to the approbation of the council, order rewards to constables for extraordinary services, and payment of all other charges for the purposes of the constabulary force under the act. If the order of things pointed out in this section were to be reversed, the watch committee, who might be a very small number, might be overborne by the council. It is important that the responsibility should rest where the legislature has cast it.

WIGHTMAN J.—Assuming these expenses to be payable out of the borough fund, if a proper order is made for the payment, is that order to be made by the town council, or by the watch committee subject to the approbation of the council? The 92d section gives no direct authority to any one, but merely describes the purposes to which the fund shall be applied. But by the 82d section the watch committee have authority, subject to the approbation of the council, to direct payment of “all other charges and expenses” of the constabulary force. Assuming that the expenses in this case should be paid out of the borough fund, it seems clear that the order should be made by the watch committee with the approbation of the council, for the constables are under the management of the watch committee, as my brother *Coleridge* has observed, and, if the council could make such an order, they might make it

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in the teeth of the watch committee, who could best judge of its propriety.

Rule absolute.

Tuesday,
January 30th

An order of petty sessions, under stat. 59 Geo. 3, c. 12, ordering a person to pay one entire sum weekly for the maintenance of his three grandchildren, so long as they should be chargeable to their parish, held bad.

The QUEEN v. MORTEN.

WHITEHURST moved for a certiorari to remove an order made by two justices of Derbyshire in petty sessions, on the 15th December last, whereby the said *Morten* was ordered to pay to the overseers of the poor of the parish of Chapel en le Frith, in the said county, weekly and every week from that time, the sum of 6s., for and towards the relief and maintenance of *Mary Morten*, *Joseph Morten*, and *Sarah Jane Morten*, his grandchildren, for and during so long a time as they should be chargeable to the said parish, or until he should be lawfully ordered to the contrary.

Whitehurst made several objections to the order. [*Coleridge* J. Is not the order objectionable for ordering one entire sum to be paid for all the children, so long as they are all chargeable?]

Humfrey, who shewed cause in the first instance, contended that the order was good so long as all the grandchildren should continue to be chargeable, and that when any one of them ceased to be so the order would drop.

Lord DENMAN C. J.—I think the order should have adjudicated as to each of them separately.

PATTESON and COLERIDGE Js. concurred.

Rule absolute.

1844.

Monday,
January 22d.

The QUEEN v. SCOTTON.

INDICTMENT for perjury, alleged to have been committed before two magistrates of the county of Stafford, on the hearing by them of an information preferred by Sir *Oswald Mosley* against one *Robinson*, for a trespass in pursuit of game.

At the trial before *Williams J.*, at the last summer assizes, it appeared that the perjury was charged to have been committed on the hearing of *Robinson's* case, which originated in the following information, taken under stat. 6 & 7 *Will.* 4, c. 65, s. 9 :

"Staffordshire, } Be it remembered, that within three
to wit. } calendar months after the commission
of the offence hereinafter mentioned, to wit, on the 13th day of January, in the year of our Lord 1843, at Rolleston, in the said county, Sir *Oswald Mosley*, of Rolleston, in the said county, Baronet, a credible witness, in his own proper person cometh before me, *William Fawkenor Chetwynd*, one of the justices of our Lady the present Queen assigned to keep the peace of our said Lady the Queen in and for the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors done and committed within the said county, and now giveth me the said justice to understand and be informed that *Richard Robinson*, of the parish of Tutbury, in the county of Stafford, did, on the 11th day of January, in the year of our Lord 1843, at the parish of Rolleston, in the said county, unlawfully commit a certain trespass, by entering in the day time of the same day upon a certain close of land in the possession and occupation of *Thomas Warren* there situate,

An information by Sir O. M. against a party for trespass in pursuit of game, after stating the particulars of the trespass, proceeded thus, "And the said information having been also verified upon the oath of *W. A.*," the said Sir O. M. prays for a summons against the accused party.

Then followed the signatures of Sir O. M. and *W. A.*, and the information concluded thus, "Exhibited by Sir O. M., and sworn before me the day and year, &c.," which was signed by the magistrate.

Held, that this information did not shew that the charge contained in it had been sworn to by *W. A.*, as the

meaning of "verified the information" was equivocal, and it was not clear that the word "sworn" at the end applied to him; and therefore that the accused party could not be summoned under stat. 6 & 7 *Will.* 4, c. 65, s. 9, which dispenses with an oath by the informer, "provided that, before any proceedings shall be taken on such information, either for summoning the party accused or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the oath of some other person or persons," &c.

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in pursuit of game, contrary to the statute in such case made and provided, whereby and by force of the said statute the said *Richard Robinson* has forfeited a sum of money not exceeding two pounds, to be applied as the said statute directs.

"And the said information having been also verified upon the oath of *William Atkinson*, of Rolleston, gardener, another credible witness, before me the said justice, "whereupon the said *Sir Oswald Mosley* prays that the said *Richard Robinson* may be forthwith summoned to appear before one of the said justices to answer the said information and make his defence thereto.

"Exhibited by *Sir O. Mosley* *Oswald Mosley,*
 before me the day and year *Wm. Atkinson."*
 first above written,

W. F. Chetwynd."

It appeared that *Atkinson* was sworn to the truth of the charge contained in the information of *Sir O. Mosley*, and then that *Robinson* was summoned to appear before two magistrates, and that the perjury in question was alleged to have been committed by the defendant on the hearing of the case against *Robinson*. The above information was put in on the part of the prosecution. It was objected that this information did not shew that the jurisdiction of the magistrates who heard the charge had properly attached, under stat. 6 & 7 *Will. 4*, c. 66, s. 9 (a), as it did not appear

(a) The section is as follows :—
 "And whereas by an act passed in the first and second years of the reign of his present majesty, intituled 'An Act to amend the Laws in England relative to Game,' it is enacted, that where any person shall be charged on the oath of a credible witness with any offence punishable upon summary conviction by virtue of the said last mentioned act, before a justice of the peace, the justice may summon the party charged to appear before

himself or any one or two justices of the peace, as the case may require, at a time and place to be named in such summons, and if such party shall not appear accordingly, then the justice or justices may proceed in the case in the manner directed by the said act; and it is expedient to explain and amend the said enactment as hereinafter mentioned; be it therefore enacted and declared, that upon any information made or exhibited before a justice of the peace of

that, before any proceeding was taken upon the information, the truth of the charge made by the informer had been "deposed to on the oath of some other person." On this point the defendant had leave to move to enter the verdict for him. Verdict for the crown.

Talfourd Serjt., in the Michaelmas Term following, obtained a rule nisi accordingly (a).

Sir *F. Pollock* A. G., *Whateley* and *Greaves* now shewed cause. It appeared by the evidence dehors the information that *Atkinson* did swear to the truth of the charge contained in the information, and it is not required that the information or deposition should be in writing.

Secondly, the information itself sufficiently shews that *Atkinson* swore to the truth of the charge. The word "verified" shews that he verified the preceding statement of the informer; and the word "sworn," which clearly does not apply to the informer, shews that *Atkinson* verified on oath. The jurisdiction therefore was complete, so that the proceeding was a judicial proceeding, in which perjury might be committed.

Talfourd Serjt. contra (with whom were *M. D. Hill* and *Gray*). The unsworn information by one person, and the testimony upon oath of another, were conditions precedent to the jurisdiction of the magistrates to institute the proceeding. The phrase "the information having been verified" may mean merely that *Atkinson* verified the authenti-

any such offence as aforesaid, it shall not be necessary that the charge contained in such information should be made on the oath of the informer or prosecutor in such case; provided that before any proceeding shall be had or taken upon such information, either for summoning the party accused or compelling his appearance to answer the same, the charge con-

tained in such information shall be deposed to on the oath of some other person or persons, being a credible witness or credible witnesses."

(a) He also obtained other rules upon other points, but the point reported is the only one on which the Court pronounced any judgment.

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city of the information by proving the informant's signature. (He was then stopped.)

LORD DENMAN C. J.—The jurisdiction was defective, for it does not appear from this instrument that *Atkinson* was sworn to the truth of the charge before the proceeding was entered upon. It is not reasonable to construe this instrument to mean that *Atkinson* deposed on oath to the matters required by the statute.

PATTESON J.—The statute requires that an information should be laid in the first instance, and that afterwards, before a summons can issue against the accused party, there should be a distinct deposition on oath by a credible witness as to the truth of the charge contained in the information. The sworn witness must pledge himself to certain facts. There is no such thing here. The language of the instrument seems to be that of Sir *O. Mosley* in the first instance, and of the magistrates in the second.

WILLIAMS J.—The whole question is, whether it appears in this case that there was any judicial proceeding, so that a person giving false testimony in the course of it could be guilty of perjury. The statute clearly requires that there should be the evidence of some witness on oath, after the information has been laid. This does not appear to have been the case here, for what is said about *Atkinson* verifying would be satisfied if he merely verified the authenticity of the information.

COLERIDGE J.—We are bound to see that the conditions precedent to the jurisdiction of the magistrates to enter upon this proceeding have been complied with. I cannot see that the charge contained in the information was deposed to on oath before the party accused was summoned to appear before them.

Rule absolute.

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IRELAND v. BERRY.

Saturday,
January 27th.

BARSTOW, on a former day in this term, obtained a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of the county of Somerset as to this action, on the ground that plaintiff had not declared against him before the end of the term next after the arrest.

The defendant had been arrested at the suit of the plaintiff in July last.

M. Smith now shewed cause. The rule of Trin. T. 3 Will. 4, was founded on the Uniformity of Process Act, by which a *capias ad respondendum* was one of the writs sued out for the purpose of commencing an action. But now, since the passing of stat. 1 & 2 Vict. c. 110, s. 2, a writ of summons is the only writ by which an action can be commenced. The *capias*, therefore, is no longer the commencement of the cause nor any step in it, for by section 5 the writ may be sued out at any time after the commencement of the action and before final judgment. The writ is altogether collateral to the action for the purpose of securing the debt in case the plaintiff should succeed. Thus, where a defendant has been arrested and given bail to the sheriff under the statute, the plaintiff does not now by declaring in chief waive his right to attach the sheriff for not bringing in the body : *Reg v. The Sheriff of Montgomeryshire* (a). So he may, after taking an assignment of the bail bond, proceed in the action without losing his right to sue the bail : *Betts v. Smyth* (b) and *Ede v. Collingridge* (c). The defendant may enter an appearance and compel the plaintiff to go on, just as if there had been no arrest.

The writ of *capias ad respondendum* under stat. 1 & 2 Vict. c. 110, is not a step in the action, but is altogether collateral to it. Where, therefore, a defendant is arrested under such a writ, the rule of Trin. T. 3 Will. 4, requiring the plaintiff "in such process" to declare before the end of next term after the arrest, is no longer applicable.

(a) 1 Dowl. P. C. (N. S.) 388.

(c) 2 Dowl. P. C. (N. S.) 764.

(b) 2 Q. B. 113 ; S. C. 1 G. & D. 284.

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Barstow contra contended that the new law of arrest was to be exercised according to the subsisting rules, except where they had been expressly abrogated, and that the obligation to the plaintiff to declare, under pain of non pros, before the end of the term next after appearance, was not sufficiently stringent to protect a prisoner against vexatious delay on the part of the plaintiff. He referred also to *Lush's* edition of the statute above cited.

LORD DENMAN C. J.—The defendant is not entitled to his discharge. The *capias ad respondendum* under the late act is not process within the meaning of the rule relied upon.

PATTESON J.—The rule does not apply. It may be said the Court should make a rule, but I doubt whether a debtor about to leave the country is entitled to indulgence.

WIGHTMAN J.—The writ is entirely collateral to the action and the rule does not apply.

Rule discharged.

END OF HILARY TERM.

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HILARY VACATION.

EVANS v. HARLOW.

Thursday,
Feb. 8th.

LIBEL. For that whereas before and at the time of committing the grievances hereinafter mentioned, the plaintiff was and still is an engineer and millwright, and the trade and business of an engineer and millwright exercised and carried on with credit and reputation, and thereby acquired divers great gains; and also was and still is the sole inventor, author or proprietor, of a new and original design for modelling or casting or making impressions on articles of manufacture of metals, or mixed metals, which said design had never been published before the registration thereof as hereinafter mentioned; and the plaintiff, so being such inventor, author and proprietor, before the publication of the said design, and before the committing the said grievances, and after the first day of July, 1839, to wit, on the 12th of August, 1842, duly registered the said design, and himself, the plaintiff, as the proprietor of the same, with *Frederick Beckford Long*, then being the registrar of designs for articles of manufacture, accord-

A declaration in case for libel averred that the plaintiff was an engineer and millwright; that he was the inventor and proprietor of a design for modelling articles of metal; that he had duly registered this design; that he published the design, and published and sold divers articles of manufacture on which it was used; that the plaintiff had on sale articles called "self-acting tallow syphons and lubricators;" that the defendant falsely and maliciously published in a newspaper of and concerning the plaintiff in his trade, and of and concerning the articles, the following libel. The declaration then set out the libel, of which these are the material parts: "This is to caution parties employing steam power from a person" (meaning the plaintiff) "offering what he calls self-acting tallow syphons, or lubricators" (meaning the said designs and the said articles, &c.) "*Robert Harlow*," (meaning himself the defendant,) "brass-founder, takes this opportunity of saying that he has to offer an improved lubricator, &c. Those who have already adopted the lubricators" (meaning the said design of the plaintiff, and the said articles, &c.) "against which *R. H.* would caution, will find that the tallow is wasted, instead of being effectually employed as professed."

Held bad on general demurrer; there being nothing to connect the libel with the earlier inducements in the declaration, and the words themselves importing no more than a caution against the goods, not an imputation on the plaintiff; and that the defendant did not by demurring admit that the words were published falsely and maliciously of the plaintiff, and therefore a libel.

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ing to the form of the statute in such case made and provided; that the said design was then duly numbered in the register according to the said statute, to wit, numbered 1402; and the plaintiff, after and from the time of such registration until committing the said grievances, and from thence hitherto, published the said design, and published, manufactured and sold divers articles of manufacture on which said design was used, and thereby obtained and acquired great credit, reputation, and profit, and every article of manufacture so published by him the plaintiff had thereon the name of the plaintiff, being the first registered proprietor as aforesaid, the number of the design in the register as aforesaid, and the date of the registration thereof. And whereas, before and at the time of committing the said grievances, the plaintiff had sold and had on sale, in the way of his trade and business, divers large quantities of articles and goods, called self-acting tallow syphons or lubricators, and thereby honestly acquired divers great gains; yet the defendant well knowing the premises, but contriving to injure the plaintiff, afterwards, and within three years from the registration of the said design, to wit, on the first day of July in the year 1843, falsely and maliciously composed and published, and caused to be published in a certain public newspaper, of and concerning the plaintiff, and of and concerning him in the way of his said trade and business, and of and concerning the said design, and the plaintiff as the inventor and proprietor thereof and manufacturer of the articles with the said design thereon, and of and concerning the said articles and goods which the plaintiff had so sold and had on sale as aforesaid, and the plaintiff as the seller thereof, a false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning him in the way of his said trade and business, and of and concerning the said design, and the plaintiff as the inventor and proprietor thereof and manu-

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facturer of the articles with the said design thereon, and of and concerning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid, and the plaintiff as the seller thereof, that is to say: "This is to caution parties employing steam power from a person" (meaning the plaintiff) "offering what he" (meaning the plaintiff) "calls self-acting tallow syphons or lubricators," (meaning the said design, and meaning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid,) "stating that he" (meaning the plaintiff) "is the sole inventor, manufacturer, and patentee, thereby monopolizing high prices at the expence of the public. *Robert Harlow*," (meaning himself the defendant,) "brassfounder, Stockport, takes this opportunity of saying that such a patent does not exist, and that he" (meaning the defendant) "has to offer an improved lubricator, which dispenses with the necessity of using more than one to a steam engine, thereby constituting a saving of fifty per cent. over every other kind yet offered to the public. Those who have already adopted the lubricator, (meaning the said design of the plaintiff, and meaning the goods and articles which the plaintiff had sold and had on sale as aforesaid,) "against which *R. H.*" (meaning himself the defendant) "would caution, will find that the tallow is wasted instead of being effectually employed as professed." By means of which premises the plaintiff was greatly injured in his credit and reputation and circumstances, and was prevented from selling divers articles made according to the said design, and also divers of the said other articles and goods which he might and otherwise would have sold, and was thereby prevented from acquiring divers great gains, which he might and otherwise would have acquired, and was and is greatly injured in the way of his said trade and business and otherwise.

General demurrer, and joinder.

The Court called on

R. V. Richards to support the declaration. The sub-

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stance of the allegations is, that the defendant published this libel of the plaintiff as a tradesman, respecting him and respecting certain goods which he then had on his hands for sale, and that he was thereby prevented from selling such goods. That is sufficient, without special damage, on the authority of *Harman v. Delany* (a). The libel there was an advertisement in the following words, "Whereas there was an account in the *Craftsman*, of *John Harman*, gunsmith, making guns of two feet, six inches, to exceed any made by others of a foot longer, (with whom it is supposed he is in fee,) this is to advise all gentlemen to be cautious, the said gunsmith not daring to engage with any artist in town, nor ever did make such an experiment, (except out of a leather gun,) as any gentleman may be satisfied at the Cross Guns in Long Acre." It was moved in arrest of judgment that this is no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way. Et per Cur.: That is certainly so, and if the defendant has gone no farther, he would not have been chargeable, they might advertise that they make as good as he, *but they ought not to say he is no artist*, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him: the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person." Words spoken of a tradesman, as such, are actionable, which otherwise would not be so: *Jones v. Littler* (c). In *Ingram v. Lawson* (d), a statement in a newspaper, that a ship of which plaintiff was owner and master was not seaworthy, and that Jews had bought her to carry out convicts, was held to be a libel on the plaintiff in his trade and business, and, as such, actionable without special damage. "The libel," said *Maule J.*, "is an im-

(a) 2 Stra. 898; *S. C.* Fitzgibbon, 121, 253.

(c) 7 M. & W. 423.

(d) 6 Bing. N. C. 212.

putation on the plaintiff in his business of a shipowner and master mariner, and not a mere disparagement of the qualities of his ship." There is also here a sufficient statement of special damage; it is averred that the plaintiff was prevented from selling divers articles; it was impossible that he could name the parties who had abstained from buying, as it has been held necessary to do where a tradesman complains of having lost his customers; and therefore the principle of *Hartley v. Herring* (a) applies, where it was held enough to state that a dissenting minister had been forsaken by many of his congregation, in consequence of a false charge of misconduct, without naming them.

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Baddeley contra. The declaration in this case does not shew that the words are actionable at all. They are not sufficiently connected with the plaintiff. There is no averment, and no colloquium, shewing that the defendant intended to refer to any thing but the design. In *Harman v. Delany* (b), as the declaration is not reported, we do not know what averments or innuendoes there may have been connecting the words with the plaintiff. Here there is not even an allegation that plaintiff manufactured the goods. If words are equivocal in themselves, the plaintiff is bound to shew by extrinsic averment to what they apply. As they stand, they simply amount to a criticism on the plaintiff's goods. In this respect a trader stands on the same footing as an artist, or a literary man: *Thompson v. Shackell* (c). There is also no allegation that the defendant intended to injure the plaintiff in the way of his trade: *Sweetapple v. Jesse* (d), *Angle v. Alexander* (e), *Kelly v. Partington* (f), *Goldstein v. Foss* (g), *Forbes v. King* (h). The statement as it stands in the declaration amounts to a simple caution to the public:

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| (a) 8 T. R. 130. | P. 170. |
| (b) 2 Stra. 898. | (f) 5 B. & Ad. 645; S. C. 2 |
| (c) Moo. & M. 187. | N. & M. 460. |
| (d) 5 B. & Ad. 27; S. C. 2 | (g) 6 B. & C. 154; S. C. 9 D. |
| N. & M. 36. | & R. 197. |
| (e) 7 Bing. 119; S. C. 4 M. & | (h) 1 Dowl. P. C. 672. |

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Delany v. Jones (a), *Stockley v. Clement* (b). If the action is to be considered as brought in respect of any imputation, exceeding the bounds of fair criticism, on the plaintiff's goods, then special damage ought to have been averred: *Malachy v. Soper* (c). In *Ingram v. Lawson* (d), the language of *Bosanquet J.* is, "The substantial question for the Court is, whether this publication was a libel on the plaintiff in his business of master mariner and shipowner, or merely amounted to a disparagement of the qualities of his ship; if it were merely the latter, then, as there is no allegation of special damage, nothing could be recovered."

R. V. Richards in reply. The want of an averment that the goods were manufactured by the plaintiff is immaterial; it is equally libellous, and equally injurious, to charge him with having on sale a stock of goods which he has falsely pretended to be valuable, as with having manufactured them. If any innuendoes are unsupported, they may be rejected as surplusage, and the plaintiff may recover, if what remains is libellous: *Harvey v. French* (e). As to the want of sufficient innuendo to connect the words with the plaintiff, the defendant has admitted that they were written "of and concerning the plaintiff" by demurring.

LORD DENMAN C. J.—I do not think the averments in this declaration render the matter complained of libellous. The defendant is charged with having said that the plaintiff falsely stated that he was patentee of a certain article, and that such a patent does not exist. There is no averment either that the plaintiff did not so state, or that the patent does exist. The defendant is also charged with having published to the world that certain articles sold by the plaintiff, called "lubricators," would not serve the purpose for which they were intended. Such an attack is no more than

(a) 4 Esp. 191.


(b) 4 Bing. 162.

(c) 3 Bing. N. C. 371.

(d) 6 Bing. N. C. 312.

(e) 1 Cr. & M. 11.

every tradesman exposes himself to; and, although the words are "falsely and maliciously published of and concerning the plaintiff," they are not sustained by sufficient averments, nor can it be contended that by demurring the defendant dispenses with the want of those averments, and makes words libellous which in themselves are not so. If a tradesman publishes to the world that his goods are superior to those of others, he necessarily lays himself open to such attacks.

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PATTESON J.—This is a confused declaration; but the libel imputed seems to be a caution to parties employing steam power from a person offering self-acting tallow syphons or lubricators, stating himself to be the inventor and manufacturer and patentee; the defendant then "takes this opportunity of saying that such a patent does not exist," and that he, the defendant, can make the lubricators, and so forth. It is *primâ facie* clear, on reading these words, that they apply to these supposed tallow syphons, and nothing else. Therefore the statement in the inducement, that the plaintiff was author of a design for modelling articles of manufacture of metal, seems to have nothing to do with the libel. There is no expression connecting that design with the syphons. It is said that the plaintiff had on sale large quantities of these syphons or lubricators; but it is not said that they were articles made under that design. Then as to the charge that the plaintiff falsely averred that he was patentee, there is no allegation that such a patent did exist. Striking out therefore the immaterial facts, the declaration reduces itself to this, that the plaintiff carried on business as an engineer and millwright, &c., that he had for sale certain syphons, (not saying that they were manufactured by him,) and that the defendant published a caution "to parties employing steam power" against those syphons. Now if this had been a caution against the plaintiff as a tradesman, because in the habit of selling bad articles for good, it would have been libellous.

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But on examination it seems to be a caution against the goods only, and no special damage is averred. To maintain an action for such an injury, it was necessary for the plaintiff to shew that he was prevented from selling these goods to certain named persons.

WIGHTMAN J.—The inducement contains four preliminary allegations: 1. That the plaintiff was an engineer; 2. That he was the inventor and proprietor of a new design; 3. That he had duly registered this design; 4. That he published and sold divers articles of manufacture on which the design was used. Then comes the main allegation, that he had on sale certain self-acting tallow syphons, which are in no way connected with the design of which he was the proprietor. The last allegation alone has anything to do with the words charged as libellous. The declaration goes on to state that the defendant, intending to injure the plaintiff, (not “in the way of his trade,”) published the words which are there set out. The part of these which relates to the patent is wholly unconnected with that about the syphons. As to these, there is no allegation that the defendant published that the plaintiff had them on sale, knowing that they would not answer their purpose. For anything that appears in the advertisements, the plaintiff might have had them on sale quite unconscious that they were bad articles. This distinguishes the case from *Harman v. Delany* (a), where the libellous charge was, that the plaintiff falsely stated that he had *mude* them to answer a purpose which they could not answer. Therefore, no special damage being alleged, the declaration is insufficient.

Judgment for the defendant.

(a) 2 Stra. 898.



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Friday,
February 9th.

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COVENANT. For that whereas heretofore, to wit, on the 23rd day of September, 1841, by a certain agreement then made by and between the said plaintiff on the one part, and the said defendant and one *John Seeley* of the other part, the said plaintiff agreed to manufacture for the use of the said defendant and the said *J. Seeley*, with the materials, machinery and implements to be provided by them, a cement equal as to durability and lightness of colour to that theretofore manufactured by the father of the said plaintiff, and to the cement used in the figure of Father Thames, then placed in the exhibition yard at No. 2, Keppel Row, New Road. And the said defendant and the said *J. Seeley*, on the condition of the said plaintiff faithfully performing the aforesaid engagement, did on their part promise to pay unto the said plaintiff the weekly sum of 4*l.* during the two years following the date of the said agreement, and the weekly sum of 5*l.* during the year next following; and they did thereby also promise to receive him into partnership with them at the expiration of three years from the execution of the said agreement, and to admit him to a third share of the trade and business of manufacturers of cement at Rotherhithe, in the county of Surrey, and to give him one-third of the stock and fixtures there at the time of his so entering the partnership, the value of which third share should not exceed 666*l.*, and to allow him a salary of 100*l.* per annum as manager of the concern, over and above his share of profit as partner. And it was thereby agreed that the opinion of two competent persons, one to be chosen by each side, and an arbitrator to be agreed on by the said referees, should decide, on the

It is covenanted and agreed between *A.* and *B.* that *A.* shall manufacture cement for the use of *B.* of a specified quality; that *B.* shall pay *A.* a certain weekly sum for two years from the agreement, and another weekly sum for one year after; and shall receive *A.* into partnership in the business of manufacturing cement at the end of three years; and that *A.* shall instruct *B.* in the art of manufacturing cement.

Held, on action brought by *A.*, assigning as a breach of this agreement that *B.* wrongfully discharged him, the plaintiff, from his service, and from manufacturing cement for the use of the defendant,

and from any longer instructing the plaintiff in the art of manufacturing cement, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years between the parties, and therefore the action was not maintainable.

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1st day of May then next ensuing, by the inspection of specimens severally prepared by the plaintiff, the defendant and the said *J. Seeley*, during the month of September or October in the year first aforesaid, which specimens should have been delivered on or before the 1st day of November into the hands and custody of the intended referees, and should have been by them exposed without interval or protection to the severity of the weather from the said date to the day of arbitration, whether the said plaintiff had fulfilled his contract therein before specified. And the said plaintiff did thereby also engage to teach and instruct the said defendant and *J. Seeley* in the art and mystery of manufacturing all the kinds of cement with which the said plaintiff was acquainted, on condition the said defendant and *J. Seeley* should not engage in such manufacture otherwise than under his management or with his consent. And it was also by the said agreement witnessed, that each party thereto did severally bind himself to the faithful performance of the contract so thereinbefore contained as aforesaid in the penalty of 1500*l.*, as by the said agreement, reference being thereunto had, will more fully appear. And the said plaintiff in fact says that he the plaintiff, from the time of making the said agreement until and at the time of making the indenture hereinafter next mentioned, in pursuance of the said agreement, did serve the defendant and the said *J. Seeley* in the manner mentioned in the said agreement, and did during that period manufacture and continue to manufacture for the use of the defendant and the said *J. Seeley*, with the machinery, implements and materials provided by them, a cement in every respect equal as to durability and lightness of colour to that theretofore manufactured by the plaintiff's father, and to the cement used in the said figure of Father Thames, according to the intent and meaning of the said agreement. And the said plaintiff in fact saith, that the said defendant and *J. Seeley* did not at any time on or before the 1st day of November, in the year 1841, nor at any time before the 1st day of May next after

the making the said agreement, choose or appoint any competent person or referee to decide according to the provisions of the said agreement, whether the plaintiff had fulfilled his said contract therein in that behalf mentioned, nor was any such competent person or referee ever chosen or appointed by them for the purpose aforesaid; and the defendant and the said *J. Seeley* wholly omitted and neglected to choose or appoint any such referee or competent person. And the said plaintiff also avers that he did, after the making of the said agreement, and until and at the time of making the indenture hereinafter next mentioned, teach and instruct the defendant and the said *J. Seeley* in the art and mystery of manufacturing all the kinds of cement with which the plaintiff was acquainted on the condition in the said agreement mentioned.

And whereas also, after the making of the said agreement, to wit, on the 17th June, 1842, by an indenture then made between the said *J. Seeley* of the first part, the plaintiff of the second part, and the defendant of the third part, &c. (The declaration then set out the indenture, which recited among other things, that *J. Seeley* and the defendant had purchased certain leasehold premises and converted them into a manufactory of cement; that the plaintiff had, by a memorandum of agreement bearing date the 23rd September then last past, under the hands of plaintiff, defendant and the said *J. Seeley*, being the agreement in this declaration above-mentioned, acquired an interest in the said manufactory of cement; and witnessed that *J. Seeley*, with the consent of the plaintiff, assigned to the defendant a moiety of the land, machinery, &c. used for the manufactory aforesaid; and contained a covenant by the defendant, that the said defendant would faithfully and truly observe and perform and fulfil the several stipulations and agreements in the said agreement of the 23rd September then last entered into and made with the said plaintiff, being the agreement above set out.

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And the plaintiff further says, that he the plaintiff, from the time of making the said indenture until the time when he was discharged by the defendant from his service as hereinafter mentioned, did, in pursuance of the said agreement and indenture, serve the defendant in the manner therein mentioned, and did during that period manufacture and continue to manufacture for the use of the defendant, with the materials, machinery and implements provided by him, a cement in every respect equal as to durability and lightness of colour to that manufactured before the making the said agreement by the plaintiff's father, and to the cement used in the said figure of Father Thames, according to the true intent and meaning of the said agreement and indenture. And also that he the plaintiff did during the period last aforesaid teach and instruct the defendant in the art and mystery of manufacturing all the kinds of cement with which the plaintiff was acquainted, according to the true intent and meaning of the said agreement and indenture. And although the plaintiff hath always been ready and willing and offered to the defendant, to wit, on the day and year next hereinafter mentioned, to continue to serve the defendant according to the said agreement and indenture, and to manufacture for his use as therein mentioned the cement as therein mentioned, and to continue to teach and instruct the defendant according to the true intent of the said agreement and indenture, of which premises the defendant hath always had notice, nevertheless the plaintiff in fact says, that the defendant, disregarding, &c. after the making the said indenture and before the expiration of two years following the date of the said agreement first above mentioned, to wit, on the 5th day of September, 1842, wrongfully discharged the plaintiff from the service of the defendant under the said agreement and indenture, and from manufacturing or continuing to manufacture cement for the use of the defendant according to the said agreement and indenture, and from any longer teaching and instructing the defendant in the art and mystery mentioned in the said agreement in that behalf, and

from any further performance of the said agreement whatsoever, and hath from thence hitherto refused and still doth refuse to permit or suffer the plaintiff to continue in the service of the defendant as aforesaid, or to manufacture cement for the use of the defendant according to the said agreement and indenture, or to teach and instruct the defendant in manner aforesaid, whereby the plaintiff hath lost all the profits and advantages he would have derived from the performance of the said agreement and indenture by the defendant; neither hath the defendant paid the plaintiff the said sum of 1500*l.* in the said agreement mentioned, or any part thereof, but the same remains wholly due, in arrear and unpaid, contrary to the true intent and meaning of the said agreement and of the said indenture; and so the said plaintiff in fact saith that the said defendant, although often requested so to do, hath not kept the said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the plaintiff hath hitherto wholly neglected and refused and still doth neglect and refuse. Damages 1500*l.*

Second plea, that the plaintiff did not serve the defendant in the manner in the said agreement mentioned, in manner and form, &c. as the plaintiff has in his declaration alleged.

Fifth plea, that the plaintiff did not teach or instruct the defendant in the art and mystery of manufacturing all the kinds of cement with which the plaintiff was acquainted, in manner and form, &c.

General demurrer to the second and fifth pleas. Joinder in demurrer.

The case was argued (on January 23, before Lord Denman, C. J., Patteson, Coleridge and Wightman, Js.) by

Peacock for the plaintiff. (The Court called on him to support the declaration.) The defendant here covenants with the plaintiff, on condition of the performance of certain stipulations by the latter, that he the defendant

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will pay him certain weekly sums for three years, and at the end of that time receive him into partnership in the specified business, that of manufacturing cement, respecting which the whole agreement is entered into; the plaintiff on his side covenanting to instruct the defendant in that business. These covenants necessarily raise a further implied contract, namely, on the part of the defendant to retain the plaintiff in his service in that business for three years, if the plaintiff performs his part. (*Com. Dig. Covenant, A. 2.*) Thus a bond conditioned to pay when such a bill of costs should be stated by two attornies, to be indifferently chosen between the parties, is forfeited by a refusal to appoint an arbitrator: *Otway v. Holdips (a)*. He also cited *Earl of Shrewsbury v. Gould (b)*, *Hays v. Bickerstaffe (c)*, *Saltoun v. Houston (d)*, *Sampson v. Easterby (e)*, and *Dawson v. Dyer (f)*.

Udall, contra.

Peacock in reply.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the Court.—This was an action of covenant for the performance of the stipulations contained in a prior agreement not under seal; and the breach complained of is the wrongful discharge of the plaintiff from service under the agreement, and from manufacturing cement for the defendant as well as from teaching the defendant the art of manufacturing cement. The defendant in his second plea pleads that the plaintiff did not serve him in manner as in the said agreement mentioned, in manner and form as the plaintiff hath

(a) 2 Mod. 266.

(b) 2 B. & A. 487.

(c) 2 Mod. 34.

(d) 1 Bingh. 433.

(e) 9 B. & C. 505; S. C. 4 M.

& R. 423; S. C. in error, *Easterby v. Sampson*, 6 Bingh. 645.

(f) 5 B. & Ad. 584; S. C. 2 N. & M. 559.

alleged in his declaration. In the fifth plea he alleges that the plaintiff did not instruct him in the art of manufacturing all cements with which he was acquainted, in manner and form, &c. To which pleas the plaintiff demurs, and the defendant in return objects to the declaration, principally that the breach is badly assigned, for that there is no contract on the defendant's part to retain the plaintiff in his service, nor any on the plaintiff's part to remain in it. The stipulations between the parties as set out in the declaration appear to be these : The plaintiff agrees to manufacture for the defendant, with the materials and machinery to be provided by him, a cement of a certain quality, and on condition of his doing so, defendant agrees to pay him weekly four pounds for two years and five pounds weekly for the following year, and then to receive him as partner. The plaintiff also further agrees to teach the defendant how to manufacture all the kinds of cement with which he is himself acquainted. Upon the face of this agreement it is certainly true that in terms there is no stipulation for retaining the plaintiff in the defendant's service ; but it is alleged for the plaintiff that in substance it is a contract of hiring and service of a special kind, and that an agreement to retain during three years is necessarily to be implied from the express stipulation for weekly wages during that period. The defendant has agreed that, if the plaintiff will manufacture the cement for him with his materials and machinery, he will pay him for so doing weekly sums during three years next following. These sums, it is said, must certainly be understood to be wages for service done ; but unless the defendant continue the plaintiff in his service, and so give him an opportunity of earning the wages, the express agreement of the parties cannot be performed on either side.

Further, it is argued that the stipulation for a partnership at the end of three years shews that it was contemplated that both the business of the cement making and the service should be continued during that time ; because without it the defendant could not really and substantially admit the

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plaintiff to *the* partnership contemplated, which was to be not in a business intermitted till that time and then recommenced, but in one which had been uninterruptedly continued, and in which the plaintiff himself had borne a part and acquired an interest and connection by service during the whole period. It cannot be denied that there is force in this argument, and in support of it were cited the cases of *Sampson v. Easterby* (a) and *Saltoun v. Houston* (b).

We have examined these and several earlier cases which were cited in the argument in the latter case, and upon consideration they do not appear to us to support the proposition for which the plaintiff contends to the extent to which it is necessary for him to carry it. It will be found in those cases that, where words of recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from them inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instruments had contained express covenants to perform them; but it is a manifest extension of that principle to hold that where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants. Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on and the service in fact continued during the three years, and yet neither party might have been willing to bind themselves to that effect. And it is one thing for the Court to effectuate the intention of the

(a) 9 B. & C. 505; S. C. 4 M. & B. 422; S. C. in error, *Easterby* v. *Sampson*, 6 Bingh. 650.
 (b) 1 Bingh. 433.

parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the Court may deem fitting for completing the intentions of the parties, but which they either purposely or unintentionally have omitted. The former is but the application of a rule of construction of that which is written; the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorised, as well as liable to great practical injustice in the application. The breach here assigned by the plaintiff assumes that the defendant, at however great loss to himself, was bound to continue his business for three years; but the defendant has not covenanted to do so; he has covenanted only to pay weekly sums for three years to the plaintiff, on condition of his performing what on his part he has made a condition precedent; and the plaintiff will be entitled to recover those sums whether he performs that or not, so long as he is ready and willing and offers to perform it, and is prevented only by the defendant from doing it. This then is the safe rule for determining the rights of these parties between each other, and no injustice follows to the plaintiff. If he should assign a breach in the nonpayment of the weekly sums, it would be no answer for the defendant to say that he had discontinued the business and dismissed the plaintiff. The reply would be, that he might indeed, if he pleased, do both, but that he was still bound to make the payments which he had expressly covenanted to make. We are of opinion therefore that the breach is not well assigned, and of course, without examining into the pleas, our judgment must be for the defendant.

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Judgment for the defendant (a).

(a) See *Dunn v. Sayles*, *post*, Hil. Vac.

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*Saturday,
February 10th.*

The corporation of Exeter has been for a long series of years in the receipt of "petty customs" or "port dues," levied on goods imported at Teignmouth. Teignmouth is a smaller port, member of the larger port of Exeter. The "petty customs" of the port of Exeter were granted to the corporation of Exeter by ancient charter, as a part of the fee farm of that city.

Held, that under these circumstances a legal origin might be presumed for the payment of these customs or dues, although neither the crown nor the corporation of Exeter were at any time owners of the soil of the port of Teignmouth, and although no consideration for them was shewn in

the shape of repairs, or any other public benefits performed by the corporation at Teignmouth. *Semble*, that if it had been shewn that the ownership of the port carried with it certain duties, e. g. repairs, &c., and that these duties had not been performed, such non-performance would not have been an answer to the present action.

Mayor, Aldermen and Burgesses of EXETER v. WARREN.


DEBT for 5*l.* for certain petty customs, dues and tolls, due and payable from the defendant to the plaintiffs on certain goods, to wit, 100 chaldron of culm; 30*l.* for petty customs, dues and tolls on 400 tons of fish; 5*l.* on thirty tons of oil, and 5*l.* on twelve dozen seal skins. Damages 10*l.* Plea: never indebted.

The defendant was a merchant at Teignmouth, and the action was brought to recover 26*l.* 12*s.* 5½*d.* for petty customs on goods imported by him into Teignmouth. It was tried before *Coleridge J.* at the Devon Lent Assizes, 1842. The question tried related to the right of the corporation to levy these dues, which appeared to be indiscriminately called petty customs or port dues, in the port of Teignmouth, as a branch or member of the port of Exeter.

The case of the plaintiffs comprehended five points: 1. The proof of the title of the corporation of Exeter to the fee farm of the city. 2. That the petty customs or town dues on all goods imported into the port of Exeter were part of such fee farm. 3. That the duties now claimed were and ever had been, as far as could be ascertained, a part of such customs. 4. That Teignmouth was a branch of the port of Exeter. 5. That defendant imported the goods in question, and refused to pay the duties. The first was proved by the charters of the corporation. The second from *Bracton*, book 2, c. 24, s. 4, and 1 Stat. West. c. 31, shewing such customs to be, in ordinary construction of law, a part of the fee farm; and from a long series of muniments, from the rolls of the mayor's court, rolls of customs, a decree of the Exchequer in 1654, judgments at law, &c., shewing that these dues had been always claimed and received as part of the fee farm of the city. The third and fifth points were

not contested on the part of the defendants. As to the fourth point, the evidence for the plaintiffs consisted of certain leases of petty customs, granted by the corporation in the 8 & 35 *Eliz.*, in which Teignmouth was included; a commission of 29 *Car. 2*, issued under the 13 & 14 *Car. 2*, c. 18, (with a view to the formation of a customs establishment), to inquire into the limits of the port of Exeter, with the return stating these limits to be from the southernmost point on the east bank of the river Axe, to the southernmost point on the west bank of the river Teign, which limits include the harbour of Teignmouth. They also put in a series of receivers' accounts, shewing the collection of port dues in Teignmouth up to a recent time, and added the oral evidence of collectors of customs and other persons. It appeared, however, that no port dues had been collected at Teignmouth since 1834. (The most material parts of the evidence are adverted to in the judgment.)

For the defence no witnesses were called; but it was contended, in the first place, that the evidence had not satisfactorily shewn Teignmouth to be a member of the port of Exeter, and especially that the return of the commissioners under *Charles 2* only shewed it to be within that port for fiscal purposes pertaining to the crown. It was contended also that the right set up to receive these petty customs was unreasonable; that a port could not be presumed to have been established, limits assigned to it, and petty customs granted, by the mere exercise of the royal prerogative; but that it was necessary there should be a reasonable consideration for the receipt of port duties anywhere, viz. either the dedication of a portion of the soil by the owner to the use of persons landing goods, or the performance of some duty, such as cleaning the port, repairing the banks, or maintaining the wharves; neither of which was shewn to exist in the present cases, nor could the soil be presumed to have been at any time granted to the corporation of Exeter, Teignmouth not being shewn to have been "terra regis." His Lordship directed the jury to the effect

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that the prerogative of creating a port was in the crown; that where there were no anterior rights vested in any person, the crown would have a right to fix the limits of the port and to grant reasonable port duties, and, consequently, that there was no necessary presumption against the right to port duties from the absence of property in the soil or of any duty performed by the receivers. Verdict for the plaintiffs.

Crowder, in the following term, obtained a rule nisi for a new trial on the ground of misdirection, and also that the verdict was without evidence. He cited (among other authorities) 2 *Rolle*, Ab. Prescription (E 5), *Lord Pelham v. Pickersgill* (a), *Com. Dig. Tolls*, (A. c), *Cro. Eliz.* 711, *Mayor, &c. of London v. Hunt* (b), *Mayor, &c. of Nottingham v. Lambert* (c), *Truman v. Walgham* (d).

Erle, Rogers and *M. Smith* shewed cause (e). The alleged misdirection is, that there is no necessary presumption against the right here claimed by the corporation of Exeter to port duties at Teignmouth, from the fact of their having no property in the soil at Teignmouth, and no consideration being shewn by the performance of services to parties landing goods or otherwise, for the levying of such duties. But the claim here set up is presumed to have its origin in a grant from the crown. The crown can create the franchise of a port and can fix the limits of that port: *Lord Kenyon C. J.* in *Ball v. Herbert* (f). It is therefore by no means essential to the existence of such a grant, that the grantee should have the freehold of the soil, or should confer any public benefit by way of consideration. "Le roi poet avoir un port et toll sans ascun consideration." *Powell J.* in *Wilkes v. Kirby* (g), where *Warren v. Pri-*

(a) 1 T. R. 667.

(b) 3 Levinz, 37.

(c) Willes, 111.

(d) 2 Wils. 296.


(e) The case was argued in Trin. Term, 1843 (May 29 and

June 5), before Lord Denman C. J., *Patteson, Williams* and *Cole-ridge* Js.

(f) 3 T. R. 261.

(g) 2 Lutw. 1519.

deaux (a) is cited by Chief Justice *Treby* to the same effect, deducing from thence the conclusion, "que le owner d'un port poet aver un toll per prescription, sans alledger d'ascun consideration." It is therefore not thrown on the plaintiffs to shew, either on their pleadings or in evidence, that they gave a *quid pro quo*. So the custom of London to have weighage for goods imported, without consideration, is good: *Mayor, &c. of London v. Hunt* (b). So of toll of goods set on land within a manor: *Crispe v. Belwood* (c), *Mayor, &c. of Exeter v. Trimlett* (d). In the *Mayor, &c. of Yarmouth v. Eaton* (e), Lord Mansfield distinguishes the case of port duties from that of toll thorough, which latter requires a consideration, because it is against common right, and decides that in a declaration for the former it is unnecessary to set out a consideration, which also distinguishes this case from *Truman v. Walgham* (f): *Jenkins v. Harvey* (g). "The king is of common right *primâ facie* the owner and lord of every public sea port, yet a subject may by charter of prescription be lord or owner of it:" *Hale de Portubus Maris*, 72; see also p. 75, 77, 78. In p. 138, *Hale* reports the case of *The Bailiff and Commonalty of Exeter v. Wade* (h), which "sets forth the city holden in fee farm at 20*l.* per ann. rent by the charter of *Edw.* 3; that the port and haven of Exeter and ferry of Exmouth, and cartage and stallage of the ferry, are parcell of the same; that they are used to take under the name of petty customs, of all goods imported into that port in ships, boats and other navigable vessels, these duties following, under the names of petty customes or town customes:" and then follow the charges. This class of duties (customs by prescription belonging to ports) are, he says (p. 139), "not properly customs. The difference stood

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(a) 1 Mod. 104.

(b) 3 Levinz, 37.

(c) 3 Levinz, 424.

(d) 2 Wils. 95.

(e) 3 Burr. 1402.

(f) 2 Wils. 296.

(g) 1 C. M. & R. 877; 2 C. M. & R. 393.

(h) Hil. 14 Car. 1, 9 Feb.

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principally in these things: 1. These were settled by prescription and usage in several ports, and therefore varied according as the several customs of various places obtained. But customs were regular and certain in all places; I mean such as were truly such. 2. These belonged to the lords of several ports, whether it were the king or a common person, as we see in the instances before given. But customs belonged to the king and to the king only, as the revenue and support of his crown." And in p. 139, he says (referring to the list of charges by way of petty customs in the port of Exeter), "By this it appears that although these were called customs, and possibly they were all that were anciently answered as customs, yet they were quite of another nature from those which are now, or in the time of *Edw. 1*, were truly so called. And they became a customary duty by prescription and usage in nature of a toll, and connected in point of property by usage and prescription to the lord of the port:" *Mador, Firma Burgi*, 220. *Viner's Abr. Prerogative*, (E a, 42), shews the difference between impositions and petty customs, and that the king inherits the latter. *The case of Impositions*, 2 State Trials, 371. "In every case which requires a consideration, it ought, from length of usage, to be presumed. For the rule with regard to prescriptions is, that every prescription is good, if by any possibility it can be shewn to have a legal commencement:" *Ashurst J. in Lord Pelham v. Pickersgill* (a). There is, no doubt, an exception to this rule in the case of toll thorough; but that is a peculiar instance, and Lord *Mansfield*, as has been before shewn, distinguishes it from those of port duties or petty customs. The learned judge was therefore right in directing the jury, that inasmuch as it was to be presumed that the crown had originally granted this port, being seised of the right to receive these duties in respect of goods imported within its limits, no consideration for taking them need be shewn by the present owners of the port.

(a) 1 T. R. 667.

Crowder, Greenwood and *Butt* contrâ. It is submitted, in the first place, that these customs could not have existed but by act of parliament. The name of "petty customs," by which they appear to be known, seems to indicate that they were originally vested in the crown for the benefit of the state. "It is clear," says *Vaughan J.*, in *Sheppard v. Gosnold* (a), "that formerly in the times of *Henry 8*, *Queen Mary*, and *Queen Elizabeth*, it was supposed that some customs were due by the common law, (wherein the King had an inheritance,) and that such customs were not originally due by any act of parliament. So is the book, 31 *Hen. 8*. This was in those several reigns the opinion of all the judges of the times, whence we may learn how fallible even the opinion of all the judges is, when the matter to be resolved must be cleared by searches not common, and depends upon cases not vulgarly known by readers of the Year Books. For since these opinions, it is known those customs called the old, or antiquæ customæ, were granted to King *Edward 1*, in the third year of his reign, by parliament, as a new thing, and was no duty belonging to the crown by the common law." *Le case de Customes*, *Davis*, 9; 2 *Inst.* 58, 59. If this were so, these duties, like the "ancient customs" mentioned by *Vaughan* and *Coke*, must be taken to have had their origin in an act of parliament, (*The case of Impositions*, 2 *St. Tr.* 8vo. ed. 371; see especially *Hakewill's* argument, p. 462,) and they could not be imposed or levied by a subject.

But, even supposing that these port duties or petty customs had their origin anterior to act of parliament, they must have been imposed by the crown for the purpose of maintaining its dignity, and for the public good. If so, they could not be granted or demised to a subject: 12 *Co. Rep.* 34. "It was clearly resolved by us that such impositions so put cannot be demised or granted to any subject, for this, that it is to *augment* and decrease, or be taken away, upon just occasion for advancement of merchandize."

(a) *Vaughan*, 161.

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In the *Case of Impositions*, judgment was given for the crown, to the effect that the King had a prerogative right to impose new customs; and the language just cited from *Coke* (as has been remarked by Mr. *Hargrave* in his preface to that celebrated case, p. 381,) seems rather to support the view then taken by the Barons of *James* the First's Exchequer, in favour of the crown. But if, as there can be now no doubt, that judgment was unconstitutional, the crown could not have, in respect of any particular port, such as Exeter, a right which it has not in respect of the kingdom in general. [*Coleridge* J. The *Case of Impositions* related to expressly new customs. These are ancient ones; your argument must be that they cannot be supported unless they can be shewn to have their origin in an act of parliament.] Not as *petty customs*; if maintainable at all, it must be as port duties, and then some consideration must be shewn. However little or inconsiderable, if they were legally customs, the crown could not grant or demise them.

If then the plaintiffs can recover these tolls at all, it must be not as "petty customs," but as "port duties," and in that case they cannot recover without shewing a public benefit accruing from them by way of consideration. Ports are of two descriptions; the first class, those which are termed "ports" in *Callis on Sewers*, p. 57, "not only safe harbours, but fenced with legal privileges," and the smaller sort, which he calls "havens," having no privileges. So *Hale*, de Portibus Maris, p. 46, "a port is a haven, and somewhat more: 1. It is a place for arriving and unlading of ships and vessels: 2. It hath a superinduction of a civil signature upon it, somewhat of franchise or privilege, as shall be shewn: 3. It hath a ville or city or borough, that is *caput portus*, for the receipt of mariners and merchants, &c." In this way, he goes on to shew, a port, having a single head, comprises also many members; as Gravesend is a member of the port of London, &c. See also *Molloy*, book 2, ch. 14, s. 10. *Hale* (p. 75, 76,) distinguishes plainly between tolls or customs levied at the greater

ports, and those secondary tolls which arise in all ports from the "interest of the shore adjacent to the port," and gives a list of the latter "shore-duties" as he calls them; towage, moreage, terrage, &c. These may arise, he says, "by convention or agreement, prescription or custom, charter or grant." The first and third method are out of the question in the present instance, reliance is placed on the second. Now in the first place, though the port of Exeter may be a prescriptive port in itself, it cannot be a *prescriptive* port extending to Teignmouth. Nothing is more inconsistent than the various catalogues of principal ports and members found in the old authorities. In 20 *Geo. 2*, c. 18, s. 1, Sunderland is called a "town having a port or haven," in *Bewes's Lex Mercatoria*, p. 247, it appears as a member of the port of Newcastle-on-Tyne. In *Bewes*, p. 248, Ilfracomb is a member of the port of Plymouth; *Hale*, p. 48, makes it a member of Barnstaple; *Molloy* calls it part of the port of Exeter. In 5 *Geo. 2*, c. 11, Scarborough is called a port: *Bewes*, p. 247, makes it part of the port of Hull. In "the Bill for the Havens in the West Parts," 23 *Hen. 8*, c. 8, Teignmouth ranks with Plymouth and Dartmouth, these being the three "ports" protected by the act; and *Hale* omits Teignmouth altogether from his list of members of Exeter. Topsham is now part of the port of Exeter; in *Hale*, p. 55, it is termed a port "belonging to the Earl of Devon." Secondly, where such a duty as this is claimed, the port must be a port in the second or smaller sense above noticed; *The Hull Dock Company v. Browne (a)*. "The enlarged sense of the term port of Hull, is to be taken with reference only to the royal revenue, and the establishment of the officers of the customs, &c. as arising in an extensive district and various places, whereof the port of Hull was the head and chief. There are then two distinct senses, in which the phrase the port of Hull is used, namely, one as the head port of a district wherein there were subordinate and dependent

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ports: and the other the limited sense of a port locally situate on a certain river, or part of a river, with a town near thereto;" p. 58. And it was decided that the rates there claimed were due only within the port in this second or restricted sense; and that instances in which these rates had in fact been paid at Goole, a member of the port in the larger sense, "might not unreasonably be referred to the unwillingness of a private individual to enter into a contest with the corporation;" an observation which applies strongly here. If so, if these tolls could not be claimed at Teignmouth by prescription, they must be due, if at all, in respect of some consideration; they are not claimed in respect to any right to the soil, which is the only alternative. It is not denied that the crown can grant the franchise of a port to a subject. But the crown cannot by its mere prerogative entitle that subject to levy port duties. If the crown grants a port to one not an owner of the soil of the shore of such port, the grantee can only take port duties either for some benefit performed, or in virtue of some arrangement come to with the owner of the soil. "The designation of ports is part of the King's prerogative, he might make regulations therein by common law, in order to secure his revenue; yet without an act of parliament he could not impose new duties;" *The case of the London Wharfs* (a). Such duties therefore can only be supported where there is a consideration: *Vin. Ab. Prerogative*, (E a 1); *Com. Dig. Toll* (C.); 2 *Roll. Ab. Prescription*, (E 5); and though *Truman v. Walgham* (b) is undoubtedly a case of toll thorough, yet the principle there laid down applies; nor is it easy to distinguish tolls levied on goods in their transit from the ship to the importer's warehouse, from toll thorough. The cases of *Smith v. Sheppard* (c), *Haspurt v. Wills* (d), *Cotton v. Smith* (e), *Crispe v. Belwood* (f), *Brett*

(a) 1 W. Bl. 590.

(b) 2 Wils. 296.

(c) Cro. Eliz. 710.

(d) 1 Mod. 48.

(e) 1 Cowper, 47.

(f) 3 Levinz, 424.

v. Beales (a), *Reg. v. The Marquis of Salisbury (b)*, refer only to the distinction in *pleading* in this respect between the respective claims of toll traverse and toll thorough; they shew that as far as the pleading is concerned, a consideration need not be shewn in the former case, but not that, in point of fact, such a claim would be good without any consideration at all. It is argued that the fact of unloading goods implies some consideration, inasmuch as this could not be done without permission; that is true, but there is no such consideration from the corporation of Exeter, who never possessed the soil. In *Warren v. Prideaux (c)*, the language of *Hale C. J.* is remarkable. "If he had said that he had a port, and *was bound to maintain* that port, &c., that might have been a good prescription; but in this case there must be a special inducement and compensation to the subject, by reason of those statutes by which all merchants and others have liberty to come in and go out:" *Vinkersterne v. Ebdon (d)*. In *Wilkes v. Kirby (e)* it is only meant that no farther consideration than repairing is required. In *The Mayor &c. of York v. Eaton (f)* the language of Lord *Mansfield* is, that the *making* a port may of itself be a consideration. But none of these cases authorises the proposition now relied on by the plaintiffs, that no consideration whatever is needed. *Jenkins v. Harvey (g)* is a case of which the authority has been doubted, but that case, when considered, establishes the rights of the corporation of Truro in regard of what they were assumed to have done by way of public benefit; *Serjeant v. Reed (h)*. It is said the crown can create a liability to the payment of "reasonable" port duties; how can their "reasonableness" be estimated, except by comparison with the benefit conferred? For the same reason a prescription for toll in

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(a) 10 B. & C. 508.

(b) 8 A. & E. 716; & C. 2 N. & P. 476.

(c) 1 Mod. 104.

(d) 1 Ld. Raym. 384.

(e) 2 Lutwyche, 1519.

(f) 3 Burr. 1426.

(g) 1 C. M. & R. 877; 2 C. M. & R. 393.

(h) 1 Wils. 91.

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respect of goods sold by sample in a market, and afterwards brought into a city to be delivered, cannot be supported: *Kirby v. Whichelow (a)*, *Com. Dig. Market F. 1*, *Hill v. Smith (b)*.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—In this case, tried before my brother *Coleridge* at the assizes for Devon, being an action for petty customs, dues, and duties, due upon culm, fish oil, seal skins, and other articles, the right of the corporation to exact certain payments in the name of port dues or petty customs, from those who land their goods at the haven of Teignmouth, as a member of the port of Exeter, was established by the verdict of a jury.

But a rule nisi for a new trial was obtained on the suggestion that my learned brother's direction was incorrect in point of law; and several points have been discussed before us, more largely perhaps than was warranted by what appears to have been the matter in contest at the trial. Upon that occasion it was not, and indeed scarcely could have been, contended, that the plaintiffs were not owners of a port to some extent, and as such entitled to receive the duties claimed in the declaration within certain limits; but it was argued that the franchise *could* not have been legally granted so as to extend to Teignmouth, and carry a right to port duties there, for want of any apparent legal consideration; and that want was said to be involved in the absence of any right in the soil either in the grantees, or the grantor, the crown. There was no evidence, it was said, that Teignmouth had at any time been *terra regis*; no soil therefore was dedicated to public use; no repairs done; nothing given in return for the duties claimed. The judge was therefore called upon to direct the jury at once that no case had been made for the plaintiffs, and that without

(a) 2 Lutw. 1408.

(b) 4 Taunt. 520.

reference to the evidence of payments insisted on by them, the verdict must pass for the defendant.

My learned brother did not deny that for the validity of a royal grant of the franchise of a port, with the right to collect port dues or petty customs, a consideration was necessary ; but he said that the right to create a port was in the crown, which it might exercise *pleno jure* so long as there was no interference with the rights previously vested ; that the consideration for port duties, as attendant on such a grant, need not be the devotion of the soil to the use of the port ; that if so, there was no evidence to support it in the plaintiffs in the present case, even to the limited extent admitted, for that there was none to prove any right of soil in them in the banks or estuary of the Exe any more than beyond the mouth, indeed their evidence disproved it ; but that considering the very early times to which this grant, if ever made, must be referred, no previously vested inconsistent rights appearing, the mere creation of the port, with the consequent right in all the subjects to use the range within the limits as a port, to bring their ships there for safety, and to trade there and unload customable goods, would be consideration sufficient in law to support the grant of the duties. He told the jury therefore, that as to the mere existence of a port, with port duties granted to the plaintiffs, there was no question ; that the real question was the extent, as to which they could not throw the plaintiff's evidence overboard at once on the ground alleged, but that, consistently with all the evidence, there was ground on which they might found a legal origin for the rights claimed by the plaintiffs.

After much consideration of the authorities, we are of opinion that this direction was right in point of law, and at least not too favourably stated for the plaintiffs. We think he might properly have added, that if the ownership of the port carried with it the obligation to clear the harbour, or do any thing else in the way of repairing or maintaining it, the non-performance of that duty might render the owners

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liable, but could not form a defence to the present action, and that a long enjoyment of the duties might warrant the presumption of any fact necessary to make them legal.

As to the general right of the crown in this matter, it will be sufficient to cite the single authority of Lord *Hale*: "It is a part," says he, "of the *jus regale* or royalty of the crown of England, originally, and *de novo*, to erect public ports in this kingdom. As all franchises within the kingdom are derived from the crown either immediately and explicitly, as by a new creation, grant, or charter, or presumptively and consequentially, as by custom or prescription, so, in a special manner, are the ports and franchises thereof, which are *ostia regni*." *De Port. Maris*, c. 3.

That this right of the crown was exercised at some very remote period, and a port erected of which Exeter was the capital, cannot now be disputed; and there seems good reason to believe that when the city of Exeter was granted to the burgesses thereof in fee farm, first by *Richard*, Earl of Cornwall, in 1259, and subsequently by *Edward* 3, the port, with the customs which the crown had before received there, passed with the grant as parcel thereof. Lord *Hale*, in the account which he gives of petty customs, (*De port. Maris*, t. 3, c. 4,) states that this was not unusual; and says that "these" (the petty customs,) "being grown inconsiderable in length of time, might be granted to the several corporations of those ports or towns wherein they were taken, as *part of their farms*, as was done in the cases of Exeter and Yarmouth, Kingston upon Hull, and some other ports." We do not cite this passage as proof of the fact, but as shewing that according to that great lawyer's opinion, there is nothing in such a state of things unreasonable, or which may not easily be presumed on proper evidence of user. We also refer to the statute of *Hen.* 8, for the purpose of showing that it has not escaped our attention. But it belongs to the head of evidence, not of law, and may possibly supply either party with some plausible arguments.

Upon the evidence in this case the grants before mentioned were produced, and strong evidence from a very remote period down to modern times offered of the perception of petty customs and port dues by plaintiffs as grantees of the port.

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Then it appears to us that the extent of the port de facto became a question merely of evidence. It could not be denied that a port might be erected with a head and many members; the existence of such ports is matter of notoriety, and Lord *Hale* mentions many instances, Exeter among them; in enumerating the members of which he certainly omits Teignmouth, an omission furnishing ground for remark, but not really of weight as evidence of the fact.

In support of their claim, the plaintiffs offered some ancient evidence; a receiver's account of the 4th *Elizabeth*, in which the officer charged himself with a gross sum of 9*l.* 9*s.* 4*d.* for customs of goods landed in several places (among others Teignmouth) within the port of Exmouth and Exeter; a lease of 35th *Elizabeth* of the town custom due for entry of all manner of ships, &c., arriving within the port or haven of the city of Exeter, viz. Exmouth, and, among other places, Teignmouth; another lease containing the same enumeration in 8 *Jac.* 1, on which the rent had been paid. But this and other evidence of the kind was not so much of independent strength, standing by itself, as indirectly in the support which it gave to the latter evidence, and from its consistency with it. The evidence in modern times, down to the year 1834, was clear, unambiguous, and uninterrupted. To all this no answer was given by counter evidence, no claim was set up for Teignmouth as a port of itself, or as a member of any other port, but strong remarks were made on the improbable extent of the port as claimed by the plaintiffs, and suggestions for the explanation of what was offered by the plaintiffs were urged, reasonable in themselves, and pressed forcibly and ingeniously on the jury. It is not complained of that justice was not done to them by the judge in laying the case before the jury.

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A commission in the time of *Car. 2* was strongly attacked by defendant's counsel, as applicable only to some proceedings in relation to the revenue; it was even claimed as evidence against plaintiff's claim to port duties; as explaining the circumstance of Teignmouth being named with Exeter. But it could not explain the ancient enjoyment. It was in no degree inconsistent with any fact essential to plaintiff's title; and at all events, the effect of it was for the consideration of the jury.

Having disposed of the legal objections to the summing up, we are asked to grant a new trial on these latter grounds, as if the verdict ought to be considered against the evidence. We think we cannot in justice do this. Where a verdict has been obtained in support of such a claim, founded on evidence not unsatisfactory to the judge, and given by a jury under no unfair bias and properly directed, we think it ought not to be lightly disturbed.

Rule discharged.

Saturday,
Feb. 10.

Lord GEORGE BENTINCK v. CONNOP.

A declaration stating that the plaintiff and defendant were subscribers to 50*l.* stakes in a certain horse-race, that the plaintiff named four horses, and the defendant three, that one of the plaintiff's

horses won, and the defendant thereby became liable to pay three sums of 50*l.* as and for the stakes payable in respect of the horses named by him: *Held* bad, as averring a wager within the terms of the provisions of 16 *Car. 2*, c. 7, s. 3, that if any person shall play, &c. at the games therein specified, (including horse races,) and lose upwards of 100*l.*, "upon ticket or credit or otherwise," and shall not pay at the time when he shall lose the same, the party who loses shall not be compellable to pay the same.

ASSUMPSIT. For that whereas, before and at the several times in this declaration after mentioned, a meeting for the purpose of horse racing, and known by the name of the First October Meeting, was annually held at Newmarket in the county of Cambridge, at which said meeting, during all the time aforesaid, a certain race, known by the name of the Grand Duke Michael Stakes, was annually run between horses and fillies named for that purpose by persons becoming subscribers to the said stakes, upon certain terms proposed and declared in that behalf, and over a certain

course there known by the name of Across the Flat. And whereas also before the making of the promise of the defendant in this count after mentioned, to wit, on the 19th day of November, 1840, it was proposed and declared that for the year 1842 the said race, to wit, The Grand Duke Michael Stakes, should be upon the terms following, that is to say, that the said race should be run at Newmarket aforesaid on the Tuesday in the first October meeting of that year, between colts and fillies named for that purpose on or before the 1st day of January, 1841, for stakes of 50*l.*, each colt or filly so named to be subscribed to the said stakes by the names of such colts and fillies respectively, the said colts and fillies at the time of the said race being run to be respectively three years old, and each such colt to carry eight stone seven pounds, and each such filly to carry eight stone three pounds, while running the said race; and the plaintiff says that afterwards, and before the said 1st day of January, 1841, to wit, on the 31st of December, 1840, the plaintiff, the defendant, and divers other persons, having notice of the premises, became subscribers to the said stakes for the said year 1842; and the plaintiff then named four colts and one filly to run in the said race in the said year 1842; and the defendant, having like notice of the premises, then named two colts and one filly to run in the same race; and which said colts and fillies so respectively named by the plaintiff and the defendant, and the said other persons, would at the time so as aforesaid fixed for the said race being run be three years old. And thereupon afterwards, to wit, on the said 31st of December, 1840, in consideration of the premises, and that the plaintiff and the said other persons, at the request of the defendant, then respectively promised the defendant that he the plaintiff and the said other persons would respectively observe and perform all things which according to the said terms were on their parts to be performed, the said defendant promised to observe and perform all things which according to the said terms were on his the

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defendant's part and behalf to be observed and performed. And the plaintiff in fact says, that on the Tuesday in the said meeting, called and known as the First October meeting of the said year 1842, to wit, on the 27th of September in that year, the said race was run at Newmarket aforesaid over the said course there, and that one of the said colts, so as aforesaid named by the plaintiff, then ran in the said race, carrying the weight which was required for colts as aforesaid, and then won the said race, of which the defendant then had notice; and the defendant thereby became liable to pay three sums of 50*l.* as and for the stakes payable in respect of the colts and filly so named by the defendant as aforesaid, and which said sums when paid belonged to the plaintiff as such winner of the said stakes as aforesaid. Yet the defendant has disregarded his promise, and, although often requested so to do, has not paid the said three sums of 50*l.*, or any or either of them, or any part thereof. There was also a count on an account stated.

Several pleas were pleaded to this declaration, to one of which the plaintiff demurred specially, and others generally. Joinder in demurrer.

Kelly (a) for the plaintiff, cited *Evans v. Pratt* (b), *Chal-land v. Bray* (c).

(The arguments against the validity of the pleas are omitted.)

Erle contrà. The declaration itself is bad, for it is founded on an illegal contract. The objection here does not arise on the 18 *Geo. 2*, c. 34, as in the two cases cited for the plaintiff. It is not contended that the race was illegal, or that the plaintiff might not have recovered the money wagered, if the same had been below 100*l.* But by 16

(a) The case was argued on November 17, 1843, before Lord Denman C. J., Williams, Coleridge and Wightman Js.
 (b) 1 Dowl. N. S. 505.
 (c) 1 Dowl. N. S. 783.

Car. 2, c. 7, s. 3, "For the better avoiding and preventing of all excessive and immoderate playing and gaming," it is enacted, that if any person shall play at any of the said games, (those enumerated in section 2, of which horse races are one,) or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party or parties who loseth or shall lose the said monies or other thing or things so played or to be played for above the sum of 100*l.*, shall not in that case be bound or compelled or compellable to pay or make good the same, but the contract or contracts for the same, and all judgments, &c. for security thereof, shall be utterly void and of none effect." The object of the statute evidently was to prevent large wagers unless for ready money payment. The declaration here alleges a contract for the payment of 150*l.* not in ready money. It is therefore not denied that the race was legal as regards the running of it; but, for the purpose of this action, it was a game respecting which the legislature has said that wagers of upwards of 100*l.* on its event, on credit, shall not be recovered. Nor does the question arise respecting a stake, which is ready money paid into the hands of a shareholder; as in *Challand v. Bray* (a), and *Applegarth v. Colley* (b). A covenant to run for 100*l.* at one time, and 100*l.* at another was held to be within the statute in *Edgbury v. Rosindale* (c).

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Kelly in reply. It is necessary that the words in 16 *Car. 2, c. 7, s. 3*, "upon ticket or credit," should receive a limited construction, otherwise the whole effect of the statutes legalizing horse racing for amounts above 100*l.* will be done away. For all racing must necessarily, in one

(a) 1 Dowl. N. S. 783.

(c) 2 Levinz, 94.

(b) 10 M. & W. 723.

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sense, be on credit. All racing for stakes to be subscribed must be on credit. If the stake is paid on one day, and the racing the next, that is a wager on credit. The credit meant by the statute must, it is submitted, be understood to be where a distinct contract for credit is entered into between the parties, otherwise 13 Geo. 2, c. 19, which renders horse racing legal, must be inconsistent with the statute of Car. 2, and if inconsistent with it, virtually repeals it.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was a demurrer to several pleas to a declaration in assumpsit; and upon the argument several points were made and discussed as to the validity of the pleas, to which we do not think it necessary now to advert, as we are of opinion that the declaration is insufficient.

The declaration states an agreement that the Grand Duke Michael Stakes should be run for by horses named by persons becoming subscribers to those stakes, and that the race should be run for stakes of 50*l.*, each colt or filly so named to be subscribed to the said stakes by the names of such colts and fillies respectively; and that the plaintiff, the defendant, and divers other persons became subscribers to the said stakes; that the plaintiff named four colts and one filly, and the defendant named two colts and one filly, and divers other persons named other colts and fillies; and thereupon, in consideration of the premises, and that the plaintiff and the said other persons at the request of the defendant then promised the defendant respectively that he, the plaintiff, and the said other persons, would respectively on their parts observe the said terms, the defendant promised the plaintiff that he would perform all things required on his part by the said terms; that the race was duly run, that one of the colts named by the plaintiff won; whereupon the defendant became liable to pay to the plaintiff three sums of 50*l.* each in respect of the colts and

filly named by him. It appears therefore that a horse race was to be run for stakes of 50*l.* for each colt or filly, to be subscribed by the persons naming such colt or filly; that the defendant named three, and became liable to pay to the plaintiff, whose horse won the race, the three sums of 50*l.* It was scarcely contended on the part of the defendant that the race itself, being for a stake of more than 50*l.*, was not legal, but it was said that, notwithstanding the race was legal, no action would lie against the defendant to compel him to pay his share of the stakes; for that by 16 *Car.* 2, c. 7, s. 3, no action will lie to recover a stake of greater amount than 100*l.*, though, had it been paid down, the transaction would have been legal. The words of the statute are, "if any person shall play at any of the said games," horse racing being one, "other than with and for ready money, or shall bet on the sides of such as do play thereat, and shall lose any sum of money so played for exceeding the sum of 100*l.*, at any time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he shall so lose the same, the party who loseth the money so played for above the said sum of 100*l.* shall not be bound to pay the same, but the contract and any promise for the same shall be void." The object of the statute was to prevent persons playing for more than a 100*l.* at any of the enumerated games except for ready money; and in the present case the stake of the defendant was 150*l.* upon a single event, the winning the Grand Duke Michael Stakes; and the defendant not having paid down the amount, the plaintiff has brought the present action to recover the money which he has won. The plaintiff, in support of the general proposition that an action might be maintained to recover the stakes won at a legal horse race, cited the two late cases of *Evans v. Pratt* (a) in the Common Pleas, and *Challand v. Bray* (b) in this Court, both of which are reported in the first volume of *Dowling's Cases*, N. S. Neither of these cases however

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 v.
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(a) 1 Dowl. N. S. 505.

(b) 1 Dowl. N. S. 783.

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applies to the question now under consideration, as in each of them the sum won and sought to be recovered by action did not exceed 100*l.*, and the only answer given at the bar to the objection that the case was within the third section of the 16 *Car. 2*, c. 7, was, that, as there was no contract for credit, the statute did not apply.

But it appears to us that the words of the statute cannot be limited to cases of express contracts for credit, but that they apply to all cases where the stake amounts to more than 100*l.*, and is not paid down immediately; and that, if it be necessary to enforce the payment, except from a stakeholder to whom it has been paid down, the case is within the words and certainly within the spirit of the act, the object of which was to restrain gaming, by obliging the parties to play for ready money, if the stakes exceeded 100*l.*

We are therefore of opinion, that, without reference to the pleas, and considering the question upon the declaration only, there should be judgment for the defendant.

There were some other objections raised to the declaration, the validity of which we do not think it necessary to consider, being of opinion that the principal objection is decisive.

Judgment for the defendant.

WHARTON v. MACKENZIE.

CRIPPS v. HILLS.

Friday,
February 2nd.

On an issue
raised on the
replication of
"necessaries,"

DEBT for goods sold and delivered and on an account stated.

to a plea of infancy, in an action against an undergraduate of Oxford, for a confectioner's bill, consisting of items partly for the defendant's own use and partly for the entertainment of his friends, *held* a misdirection to leave to the jury whether the articles supplied were necessaries suitable to the then degree, &c. of the defendant, inasmuch as such articles, when supplied to an infant at college in statu pupillari for the entertainment of others, cannot be necessaries.

It is for the Court to decide whether the particular articles are capable of being necessaries, according to the position of the defendant, and for the jury, within this limit, to decide whether they are so or not.

Plea: Infancy.

Replication to the plea of the defendant, so far as the same relates and is pleaded to the making of the said contract in the first count of the declaration, that the said goods in the said first count mentioned were, at the time when they were sold and delivered by the plaintiff to the defendant at his request, as in the said first count mentioned, necessaries suitable to the then degree, estate, circumstances and condition of the said defendant.

Nolle prosequi as to the last count.

Rejoinder: that the goods were not necessaries suitable to the then degree, estate, circumstances and condition of the defendant, whereupon issue was joined.

At the trial before *Wightman J.* at the Oxford Lent Assizes, 1843, it appeared that the plaintiff was a confectioner at Oxford, and the defendant, who was the son of a gentleman of fortune, was an undergraduate of St. John's College, in the University, at the time of the cause of action. The action was brought to recover the amount of the plaintiff's bill for deserts and confectionery supplied to the defendant while an undergraduate of the University, a portion of which had been ordered by the plaintiff while in ill-health, under the advice of his medical attendant, and part supplied for the purpose of his entertaining his college friends.

At the trial it was objected for the defendant, that the plaintiff could not recover in respect of those items which had not been supplied for the defendant's own consumption, as they could in no view of the case be deemed necessary to a party in statu pupillari. The learned judge, however, left the case to the jury in the words of the replication, directing them to say whether the articles supplied were necessaries suitable to the then degree, estate, circumstances and condition of the defendant. The jury returned a verdict for the plaintiff with 25*l.* damages.

Talfourd Serjt., in Easter Term following, obtained a rule nisi for a new trial on the ground of misdirection, con-

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tending that it was the duty of the learned judge to have told the jury that, the defendant being in statu pupillari at the University, the articles supplied for the entertainment of his friends were not legally necessities.

F. V. Lee and *Piggott* now shewed cause. It is undisputed that the items supplied for the plaintiff during his illness were necessities—whether the other portions of the bill consisted of necessities or not was properly a question for the jury, taking into consideration the rank and station of the defendant, and was properly so left to the jury by the learned judge: *Peters v. Fleming* (a). The proper test is that the articles supplied should be useful and suitable to the rank of the defendant, if so, they are necessities. *Brooker v. Scott* (b) does not carry the rule further than this. The fact of the articles not being all intended for the exclusive consumption of the defendant does not affect the case, if such a consumption was suitable to his rank and condition: *Hands v. Slaney* (c).

Talfourd Serjt. contrà, was stopped by the Court, who desired to hear the argument for the plaintiff in the case of *Cripps v. Hills* before calling upon him.

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Debt for goods sold and delivered.

Plea, as to the causes of action in the declaration mentioned, except so far as they relate to the sum of 25*l.*, parcel, &c., nunquam indebitatus.

And for a further plea as to the said causes of action, except so far as they relate to the sum of 25*l.* parcel, &c., infancy.

And as to the said sum of 25*l.* parcel, &c., payment of that sum into Court.

Replication: As to the plea of the defendant by him first above pleaded, so far as it relates to the residue, &c.,

(a) 6 M. & W. 42. (b) 11 M. & W. 67. (c) 8 T. R. 578.

that the goods therein mentioned were, at the time of sale and delivery, necessaries suitable to the then degree, estate and condition of the defendant. And as to the residue, that at the time of the accruing of the causes of action in the declaration mentioned whereunto the said residue relates, the defendant was of the full age of twenty-one years, and not an infant within the age of twenty-one years, in manner and form as the defendant hath above in his said second plea in that behalf alleged.

And as to the plea of the defendant by him lastly above pleaded, the plaintiff accepts and takes out of the said Court the said sum of 25*l.* in full satisfaction and discharge of the said sum of 25*l.* parcel, &c.

The rejoinder traversed the allegation in the replication, that the goods therein mentioned were, at the time of the sale and delivery thereof, necessaries suitable to the then degree, estate and condition of the defendant, whereupon issue was joined.

The cause came on to be tried at the Oxford Summer Assizes, in the year 1843, before *Maule* J. and a special jury, when it appeared that the plaintiff was a cook and confectioner at Oxford, and the defendant the son of a gentleman of property, residing at the time the articles in question were furnished in Magdalen Hall as an undergraduate of the University, with an allowance from his father of 300*l.* a-year. The plaintiff brought his action to recover the sum of 49*l.* 10*s.* 2*d.* for various articles of cookery and confectionery supplied to the defendant while in statu pupillari as an undergraduate of the University of Oxford; the substance of his particulars of demand being as follows:—

	£.	s.	d.
Coffee, toast, &c.	20	6	0
Deserts, luncheons, &c. . . .	13	5	9
Meat, game dinners, &c. . . .	15	18	5
	<hr/>		
	49	10	2
	<hr/>		

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It was proved by the father of the defendant, who was called as a witness, that he was aware of a part of this expenditure, and had partaken of some of the articles comprised in the plaintiff's bill at his son's rooms while on a visit to the University. The learned judge left it to the jury to say whether the articles supplied were necessaries suitable to the then degree, estate and condition of the defendant; but he did not direct them that the fact of the defendant being in statu pupillari was to be taken into consideration in determining whether all or any of the articles were necessaries. The jury found for the plaintiff with 24*l.* 10*s.* 2*d.* damages.

In Michaelmas Term following, *Talfourd* Serjt. obtained a rule nisi for a new trial on the ground of misdirection, against which

Whately and *F. V. Lee* now shewed cause. The rule was obtained on the authority of *Brooker v. Scott* (a), that the Court will look into the bill and decide the question of necessaries from a comparison of the articles with the particular circumstances in which the defendant was placed at the time. But this has always been a question for the jury and not for the Court; it arises on the traverse of the replication, that the goods were suitable to the then degree, estate and condition of the defendant, and is a question of fact to be decided by them on a view of all the circumstances of the case, and was properly left to them by the learned judge. All the authorities concur that if any single article in the bill may fall within the description of necessaries, the whole must be left to the jury: *Maddox v. Miller* (b), *Brayshaw v. Eaton* (c). The cases were all reviewed in *Peters v. Fleming* (d). *Parke* B. there says, "It is perfectly clear, from the earliest times down to the present, the word necessaries was not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in

(a) 11 M. & W. 67.


(b) 1 M. & S. 738.

(c) 5 Bing. N. C. 231.

(d) 6 M. & W. 42.

the state, station and degree of life in which he is, and therefore we must not take the word necessities in its unqualified sense, but with the qualification pointed out. Then the question in this case is, whether there was any evidence to go to the jury that any of these articles were of that description." The case of *Rainford v. Fenwick* (a) shews that the question of necessities or not necessities was always for the jury, and not for the Court. That was *indebitatus assumpsit* for clothes and laces for the defendant and his servant. Plea, infancy. "Replication, that at the time defendant was son and heir apparent of Sir R. F., and was by consent of his father in treaty of marriage with the daughter of the Earl of —, and these things were for wedding clothes." Demurrer to the replication. *Wild J.* there says, "By his demurrer he hath confest them to be necessities; the defendant should have come and rejoined that they were not necessities, and so upon the issue the jury would have tried it." Here the question has been submitted to a special jury of the county, who were the proper parties to decide whether the articles supplied were necessities according to the rank and condition of the defendant. The fact that the defendant's father provided him with a competent allowance does not render the defendant incapable of contracting for necessities upon credit; *Burghart v. Hall* (b); and by sanctioning the expenditure, the father relieved the plaintiff from any inquiry into the defendant's station and circumstances, which might under other circumstances have been incumbent on him: *Dalton v. Gib* (c).

Talfourd contra. The rule is one of great importance. The replication, that the articles were necessities suitable to the then degree, estate and condition of the defendant, not only involves the rank of the defendant and his position in the world, but his condition as an undergraduate of the

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(a) Carter, 215. (b) 4 M. & W. 727. (c) 5 Bing. N. C. 198.

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university of Oxford. The question of necessaries is a mixed one of law and fact, and as such to be submitted to the jury, who are to exercise their judgment upon the facts, subject to the direction of the judge as to the law applicable to them. The law is correctly laid down in *Harrison v. Fane* (a). That was an action for the hire of horses and gigs by an infant, an undergraduate of Oxford at the time. The learned judge there told the jury that the hiring of horses and gigs was not necessary for a person in the defendant's circumstances, and that necessaries were such things as the defendant in his station of life could not do without. The jury having found a verdict for the plaintiff, the Court of Common Pleas set it aside as perverse. It cannot be said that it is necessary for the defendant in his condition of undergraduate of the university, and supplied at the table of his college with necessary meat and drink, to give parties for the entertainment of his friends, or that articles supplied in relation to such a purpose are things which the defendant in his position could not do without.

Lord DENMAN C. J.—These cases which have been so frequently before the Court render it necessary to lay down some rule which may be capable of being easily applied. The law has been most correctly stated by my brother *Parke* in the case of *Peters v. Fleming* (b). The plaintiff alleges in the replication, that the goods mentioned in the declaration were necessaries suitable to the then degree, estate and condition of the defendant. This he is to make out. Now what are properly necessaries for a person at college in statu pupillari, supplied from his college with all he wants and a large allowance from his father? I think the learned judge would have been clearly justified in directing the jury that all that had been supplied for the entertainment of the defendant's friends could not be necessaries, and that the bills afforded no evidence to charge

(a) 1 M. & Gr. 550.

(b) 6 M. & W. 42.

the defendant with the payment of those items. This was all the Court meant to say in *Brooker v. Scott* (a), that the bill there did not afford *primâ facie* evidence that the articles were necessities suitable to the defendant's then condition. The circumstances under which they have been supplied in the present instance afford evidence, on the contrary, to disprove their necessity. In *Peters v. Fleming* (b) it was said that a judge could not withdraw from the consideration of the jury, whether a watch was not a necessary thing for a young man at college, of the age of eighteen or nineteen, to have; and properly so, for a watch might be useful to a person so circumstanced, and it is for the jury, within the defined limit of whether the thing is capable, according to the position of the defendant, of being requisite for him, to say whether it is so or not. But mere articles of luxury, supplied to the defendant for the entertainment of others, could under no circumstances be necessities suitable to his condition as an undergraduate. This may seem hard upon tradesmen at the university, but they should either send in their bills at shorter periods, and give no further credit until payment of what is due, or deal for ready money only. The Court can only look at the rule of law, which has been clearly stated, and it is of the greatest importance that it should be strictly kept.

COLERIDGE J.—I am entirely of the same opinion. In many instances the question must be altogether for the Court; for example, in the case of diamond rings and such articles as are purely ornamental, and cannot be requisite for any one, a judge would be clearly warranted in telling the jury that there was no evidence of necessities in such a case. But, where the articles are not strictly of that description, but of a nature that may or may not be requisite for the defendant, there the jury are to take into consideration his circumstances and station in deciding whether they are so or not. I will only add to what was said by my

(a) 11 M. & W. 67.

(b) 6 M. & W. 42.

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brother *Parke* in *Peters v. Fleming* (a) this, that, although the replication involves the station and condition of the party, still the question all hinges on what are necessities. And this comes back to what is said by the Court in *Brooker v. Scott* (b), that such things as form the subject-matter of this bill, if unexplained, are not necessities for a person at college in statu pupillari. The tradesmen have a safe course to follow, namely, to give no credit. In one of these cases the bill extends over a period of two years and a half. Such credit can only be given to induce young men at the university to run up a bill. It is the duty of those who supply the articles to see that they are paid for in reasonable time, if not they must take the consequences.

WIGHTMAN J.—I entirely agree with my Lord and my brother *Coleridge*. In the first case the question was left by me to the jury in the words of the replication. It was contended that these had reference to the defendant's station in society, and not to his position as an undergraduate at the university; and it appeared that he associated with persons of at least as high rank as himself. I think, however, that I left the question too much at large, and did not sufficiently point out to the jury that the items in the bill were to be construed in reference to the defendant's position at the university in statu pupillari, and that I ought to have told them that in no case could goods supplied for the entertainment of others be considered as necessities for the defendant in his then position, but that if he wished to give such entertainments he must pay for them with ready money.

Rule absolute.

(a) 6 M. & W. 42.

(b) 11 M. & W. 67.



1844.

Saturday,
February 10th.

GREVILLE v. CHAPMAN and others.

LIBEL. The declaration stated, that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, to wit, on the 25th May, 1842, a certain race called the Derby Race had been and was run at a certain place called Epsom Downs near Epsom, in Surrey, by and between a certain horse called Attila, and a certain other horse called Robert de Gorham, and divers other horses, for certain stakes, amounting altogether to a large sum, to wit, 9100*l.*, subscribed by divers, to wit, 182 subscribers, and said race had been won by said horse called Attila, and said horse called Robert de Gorham came in second horse in said race, and in the running of said race beat said other horses, except said horse called Attila. That before said race was so run as aforesaid, a certain horse called Canadian had been and was entered as one of the horses for running the same, and the owner thereof was entitled to have the same run in said race, or to withdraw same from the running in same as he might think fit. That after said horse called Canadian had been so entered to run said race, and a short time before said race was so run as aforesaid, to wit, on the 9th May, 1842, plaintiff became and was the purchaser of the said horse called Canadian, and before and at the time when the said race was run as aforesaid, and also at the time when the said horse called Canadian was withdrawn from the said race as hereinafter mentioned, was the owner of the said horse called Canadian; and, but for the unfitness of the same to run the said race, as hereinafter mentioned, it was the intention of plaintiff that the same should run, and the same would have run, in the same. That a short time

In case for libel, the declaration shewed that the plaintiff was a member of the Jockey Club, and subscriber to the Derby Stakes at Epsom, and had withdrawn a horse which he intended to run; it then set out words imputing to the plaintiff that he had entered the horse to run for those stakes, and afterwards withdrawn him for the purpose of getting an unfair advantage over parties with whom he had heavy wagers on the result of the race: *Held*, that the action would lie, and this whether or not the transactions in which the declaration shewed the plaintiff to be engaged were legal.

A witness, a member of

the Jockey Club, was asked whether in his opinion the conduct thus imputed to the plaintiff was honourable, which he answered in the negative. *Held*, that the evidence was admissible, the question having been put in re-examination, to explain a former statement of the witness on cross-examination, that entering and withdrawing a horse after betting on it was not contrary to any regulation of the Jockey Club.

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before said race was run as aforesaid, to wit, on the 22nd May, 1842, the said horse called Canadian was discovered to be and was lame, and was afterwards, to wit, on the 23rd May, 1842, carried and conveyed in a van to Epsom aforesaid, in order that the said last mentioned horse might run in the said race if he should be able, or in a fit and proper state so to do. That the said horse continued to be and was lame from the day and year last aforesaid until a certain other day shortly before the said race was run, to wit, until Tuesday the 24th May, 1842, when the said horse being and continuing lame and unfit to run, and incapable of running in the said race, and being then in such a state that it would have been injurious to the said horse called Canadian to run in the said race, the said plaintiff withdrew the said last mentioned horse from, and would not suffer or permit him to run in the said race, nor did the same run then. And the said plaintiff saith that at the time of the withdrawing of the said horse from the said race as aforesaid, there was no probability that the said horse could recover his said lameness in time to run, or be fit or capable to run in the said race, and that the said horse continued and was lame and unfit and incapable to run in the said race until and at the time when the same was run as aforesaid. That before the running of the said race, and before and at the time of the committing of the grievance by defendants as hereinafter mentioned, divers persons had associated themselves together, and formed a club called the Jockey Club, and plaintiff had become and was a member of that club. That also before and at the time of the committing of the grievances by defendants as hereinafter mentioned, the principal and ordinary signification and meaning of the statement or the term that a person had betted 10,000 to 300 against a horse entered and engaged for running a race with another horse or horses, was and still is, that he had betted and wagered with another person 10,000*l.* to 300*l.* that such horse would not win such race, and that such last mentioned person had betted and wagered

with him 300*l.* to 10,000*l.* that such horse would win said race. That before and at the time of the committing of the grievances by defendants as hereafter mentioned, the principal and ordinary signification and meaning of the statement or term, that a person had betted 10,000*l.* to 100*l.* against a horse entered and engaged for running a race with another horse or horses, was and still is, &c. (Then followed a similar explanation to that above set out as to the meaning of the first mentioned bet.) That before and at the time of the committing of the grievances by defendants as hereafter mentioned, the principal and ordinary signification and meaning of a statement or the term, that a person had laid the odds to the amount of 1500*l.* more, when made and used in reference to a previous statement that such person had betted and wagered with another person or persons a larger sum of money to a less sum that a horse entered and engaged to run a race with other horses would not win such race, was and still is that he had still further betted and wagered with another person or persons to the amount of 1500*l.* to a sum or sums not amounting to 1500*l.* that such horse would not win such race. Yet defendants well knowing the premises, but contriving and wickedly and maliciously intending to injure plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy, contempt and disgrace, and to cause it to be suspected and believed that he the plaintiff had been and was guilty of the misconduct hereinafter mentioned to have been imputed to his charge, heretofore, to wit, on the 29th May, 1842, in a certain newspaper called the Sunday Times, falsely, wickedly, and maliciously did publish a certain false, scandalous, malicious and defamatory matter following of and concerning the plaintiff, and of and concerning the said race so run as aforesaid, and of and concerning the said horse called Canadian, and the said horse called Robert de Gorham, and of and concerning the said horse called Canadian having been so entered and engaged to run the said race, and of and concerning the same having been so taken

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to Epsom as aforesaid, and of and concerning the withdrawing of the said horse called Canadian from the said race as aforesaid, and of and concerning Tuesday the 24th of May, 1842, and also of and concerning the said association and club called the Jockey Club, that is to say: "And now to wind up with a few words on the Canadian affair," (meaning the withdrawing of said horse from said race as aforesaid.) "To what a degree of degradation and contempt is the Jockey Club" (meaning the said association or club called the Jockey Club) "reduced, when its own members, the turf legislators themselves, laugh to scorn the power of its laws, and publicly and unblushingly charge each other with practising a most iniquitous system of turf trickery and deceit. The scene that was enacted at the Spread Eagle at Epsom on Tuesday night," (meaning the night of Tuesday the 24th of May, 1842, aforesaid,) "will, it is to be hoped, from the exposure that took place, operate as a caution to the honest better to distrust the man, however high his rank, who, after having laid his thousands against a horse, becomes its purchaser within a few weeks before the race comes off, for which that horse by his public performances had elevated himself into very high favour, and to whose capabilities there is every probability attached that he will pull triumphantly through. Canadian" (meaning said horse called Canadian,) "the stable companion of Robert de Gorham," (meaning said horse called Robert de Gorham,) "could give the latter a large lump of weight, and still beat him cleverly. What conclusion then may we draw from this fact as to the probable issue of the Derby" (meaning said race called the Derby) "had Canadian" (meaning said horse called Canadian) started." (meaning started in said race.) "But Canadian" (meaning said horse called Canadian) was sold, and a lame excuse is better than no excuse at all. The horse" (meaning said horse called Canadian) "is however brought to the appointed place of contest; the deception is carried on until the very day before the race" (meaning said race,) "and then the

bubble bursts. The horse" (meaning said horse called Canadian) "is at the eleventh hour, nearly, discovered to be lame, and must therefore be drawn, (meaning withdrawn from said race.) "Was the horse" (meaning said horse called Canadian) "lame when he got into the van? or when he came out of it? That's the question. Why, it was fearlessly declared in the presence of a large body of the sporting fraternity, at the place previously alluded to, that the then owner of Canadian" (meaning plaintiff) "had, on the Thousand day at Newmarket, stated that he" (meaning plaintiff) "had betted 10,000 to 300 against the horse," (meaning said horse called Canadian,) "and which bet he" meaning the plaintiff) "considered at the time that it was laid to be a good one; that when Canadian" (meaning said horse called Canadian) fell lame, he had betted 10,000 to 100 against him" (meaning said horse called Canadian,) "and that on that very day" (meaning Tuesday the 24th May, 1842, aforesaid,) "he" (meaning plaintiff) "had laid the odds to the amount of 1500*l.* more. If this statement is correct, and there is little doubt of it, for the integrity of the gentleman who made it cannot be impugned, and he even offered to appear before any tribunal and take oath as to its truth, then the denouncements that the Canadian affair" (meaning the withdrawing of the said horse called Canadian from said race as aforesaid) "was nothing short of an infernal robbery, are fully justified, and an indelible blot will henceforth rest on the escutcheons of those persons" (meaning amongst others the plaintiff) who perpetrated it." By means of the committing of which said grievance by the defendants as aforesaid, the plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects to whom the innocence and integrity of plaintiff in the premises were unknown, have, on account of the committing of the said

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grievances by the defendants as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff to have been guilty of the misconduct so as aforesaid imputed to his charge, and have by reason of the committing of the said several grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the plaintiff, as they were before used and accustomed to have, and otherwise would have had, and the plaintiff hath been and is by means of the premises otherwise greatly injured.

The defendant pleaded not guilty, and several special pleas by way of justification; and issue was joined. At the trial before Lord Abinger C. B., at the Surrey Summer Assizes, 1842, the plaintiff proved the publication of the libel and also the facts of the case, in order to shew the nature of the libel. It appeared that the plaintiff had in fact, before his purchase of Canadian, betted considerable sums on the Derby ensuing after the purchase, for which that horse was entered to run; but that the plaintiff's engagements were such, that the lameness of the horse, making him unable to run, rendered the plaintiff a loser instead of a winner. The defendant offered no evidence in support of his special pleas, but his counsel urged that the plaintiff must be nonsuited, on the ground that on his own shewing the libel was published respecting an illegal transaction in which he was engaged, namely, the betting of illegal sums on a horse race. Lord Abinger reserved the objection. Verdict for the plaintiff, damages 250*l.*, with leave to move to enter a nonsuit.

A rule nisi having been obtained accordingly on the authority of *Morris v. Langdale* (a), *Hunt v. Bell* (b), *Manning v. Clement* (c), *Yrisarri v. Clement* (d); and also for a new trial, on the ground of the reception of certain illegal evidence;

(a) 2 Q. B. 284.

(c) 7 Bing. 362.

(b) 1 Bing. 1; S. C. 7 Moore, 212.

(d) 3 Bing. 432.

Thesiger (a), *Hodges*, and *Peacock* shewed cause in the sittings after Michaelmas Term, 1843. The supposed illegality of the proceeding in which the plaintiff was engaged, and out of which the libel arose, was extracted here by the cross-examination of the plaintiff's witnesses, and not in support of any defence pleaded by the defendant. But such a defence should have been specially pleaded, *Fenwick v. Laycock (b)*, which was even a stronger case than the present, inasmuch as the contract which the plaintiff himself there sought to enforce was illegal. The cases cited in obtaining the rule differ from the present in this, that the imputations which the libels there in question cast on the plaintiffs were such as were so closely connected with the illegal proceedings, as to lose their libellous character in consequence of such illegality; not, as here, imputations of dishonourable conduct arising out of transactions said to be illegal, but independent of the transactions themselves. Thus in *Morris v. Langdale (c)* the imputation was that of insolvency as a stockjobber; that is, incapability of fulfilling certain contracts; it was held that the plaintiff must shew on the face of his declaration that the contracts were legal. "No special damage," it is there said, "can be said to have arisen from words which may import an accusation that the plaintiff has not done that which the law prohibits." Here, the accusation cannot import that the plaintiff has not betted illegally: it imports that he has betted illegally, and has cheated in doing so. In *Hunt v. Bell (d)* the plaintiff himself averred in his declaration the legality of the business in which he was engaged, and in respect of which he was libelled, viz. the keeping a tennis court for various pugilistic purposes, among others; the issue being on not guilty, the jury were of opinion that the business was not lawful, and the Court refused to disturb their verdict for the

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(a) In Mich. Term last (Nov. 27, 1843), before Lord Denman C. J., *Williams, Coleridge and Wightman* Js.

(b) 1 Q. B. 414; S. C. 1 G. & D. 27.

(c) 2 Q. B. 284.

(d) 1 Bing. 1; S. C. 7 Moore, 212.

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defendant. In *Manning v. Clement* (a) also, which was a libel on a manufacturer of bitters, the legality of the business was an essential part of the plaintiff's case, and it was held open to the defendant to show the contrary. In *Yrisarri v. Clement* (b) it was held that although libel does not lie for anything written against a party touching his conduct in an illegal transaction, yet it lies for misconduct imputed to him in any matter independent of the illegal transaction, though arising out of it. "If a man (says *Best C. J.*) is guilty of an illegal transaction, fraud *ultrà* that transaction is not on that account to be imputed to him." Suppose that in the present instance the plaintiff had confined his case to the proof of publication, the defendant assuredly could not have called witnesses to prove the illegality of the transaction under his plea of not guilty; and, if not, he is equally unable, under the same plea, to pray in aid evidence which has been elicited from plaintiff's witnesses in the course of the inquiry.

The evidence objected to was given in the following manner. A witness, a member of the Jockey Club, had been asked in cross-examination, whether such conduct as that imputed to the plaintiff, in purchasing a horse with a view to withdraw it from a race in the event of which he was interested in respect of wagers, and to which he had subscribed, was contrary to the rules of the Jockey Club. The witness answered it was not. The object of the question plainly was to impress upon the jury that there was no libel in imputing to a party conduct, which, however dishonourable in itself, was sanctioned by the rules of the body with which he was acting, and in whose good opinion he was interested. Upon this the question was put, in re-examination, whether in the witness's opinion such conduct, although it might not be contrary to the letter of the institutions of the club, would not be highly dishonourable, which he answered in the affirmative. The evidence must be taken in connexion with that which went before, and which it was intended to explain.

(a) 7 Bing. 362.

(b) 3 Bing. 432.

Sir *W. W. Follett* S. G., *E. James*, and *J. P. Taylor*, contrà. The argument proceeds on the supposition that the libel is concerning matter altogether collateral to the illegal transaction, which is not the case. The declaration alleges that the plaintiff was at liberty to run or withdraw his horse as he pleased, which was proved to be the fact by several witnesses. As far as regards the Derby Stakes, therefore, it is no imputation on the plaintiff that he was owner of a horse and withdrew him. So far, he merely gives up his chance of winning the stakes. But when it appears that the plaintiff has laid bets against the horse, and therefore gains by its withdrawal, this becomes a charge of dishonourable conduct. Nor does any point arise on the pleadings. Anything which shews that words spoken or written were used in a sense not defamatory, may be given in evidence under the general issue. There being no innuendo which was sufficient of itself to imply the libel, the plaintiff had necessarily to prove the nature of the charge which the defendant had brought against him. The simple question here therefore is, does the dishonourable conduct imputed immediately arise out of the illegal bets, or is it only collaterally connected with them. It is admitted that in the former case the action would not lie; and it is contended that this distinguishes *Manning v. Clement* (a) from the present case, the action there being touching the illegal trade itself. But in *Hunt v. Bell* (b), where the charge against the plaintiff was, that in the course of keeping an establishment, which the jury found to be illegal, he had acted with dishonesty, the action was equally held not maintainable, and if that case be law, it applies directly to the present, and it is supported in *Yrisarri v. Clement* (c); see *Holman v. Johnson* (d). [Lord Denman C. J. In *Hunt v. Bell* (b), the declaration averred that the libel charged that the plaintiff, "as such owner,"

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(a) 7 Bing. 362.

(c) 3 Bing. 432.

(b) 1 Bing. 1; S. C. 7 Moore, 212.

(d) 1 Cowp. 141.

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i. e. as owner of the illegal establishment, had made certain false announcements.] If a party keeping a hazard table were to be charged with playing unfairly, (unless the words imputed an indictable offence, which would alter the case,) no action would lie. The whole is under the general principle according to which the law refuses protection to parties engaged in illegal affairs for injuries arising directly from those affairs; *Stockdale v. Omohyn* (a). [Lord Denman C. J. referred to *Stockdale v. Tarte* (b).]

As to the point of evidence: the very question for the jury to try was, whether the libel imputed dishonourable conduct, and was therefore injurious to the plaintiff's character. The Court could not take the opinion of a witness whether such conduct were dishonourable or not. The question is said to have been put merely in explanation of what had gone before, but that was unnecessary, though evidence as to the rules of the Jockey Club had been given, and was not at all altered by the subsequent answer: *Ramadge v. Ryan* (c), *Campbell v. Richards* (d), *Wright v. Doe d. Tatham* (e).

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an action for a libel on the plaintiff, imputing that he had entered a horse to run for certain stakes at Epsom races, and had afterwards fraudulently withdrawn him for the purpose of obtaining an unfair advantage over other persons with whom he had laid wagers on the expected race. A justification was pleaded, but was negatived by the jury, who found a verdict for the plaintiff, with 300*l.* damages.

A rule nisi for a new trial was granted on two grounds; first, that plaintiff presented himself by his evidence as a

(a) 5 B. & C. 173; S. C. 7 D. & R. 625.

(b) 4 A. & E. 1016.

(c) 9 Bing. 333.

(d) 5 B. & Ad. 840; S. C. 2 N. & M. 542.

(e) 7 A. & E. 313; S. C. 2 N. & P. 305.

person who had no right to sue in a court of justice for injury to his character. The objection to his right of suing, from being engaged in horse racing, appears on the record, but in truth it is wholly groundless. For even if running a race without fraud were altogether prohibited by the law, still the party infringing its provisions would not thereby be deprived of all protection to his character in other matters connected with the transaction; (in support of which proposition numerous authorities were quoted;) but moreover the fact of engaging in a horse race is not in itself an illegal act.

Another ground for a new trial was urged; an improper question supposed to have been allowed in the examination of Lord *John Fitzroy*, an important witness for plaintiff, who described the mode of proceeding by the Jockey Club in settling disputes between parties engaged on the turf. It was objected that the question related to the view which in the witness's opinion ought to be taken of the moral character of certain regulations made by the Jockey Club, thus transferring to the witness the functions of the jury. But when we look at the course of examination of that witness, we think that such was not the case. The libel declared on consisted in imputing to plaintiff that he acted dishonourably in withdrawing a horse which had been entered for a race. It appeared in evidence that he was a member of the Jockey Club, and that according to their rules, those who may have entered their horses have the privilege of withdrawing them before the race is run.

The witness had stated that disputes on such occasions are referred to the Jockey Club, who decide according to justice and equity. In his cross-examination he was asked whether the rules did not give power to a subscriber to withdraw his horse at his own pleasure, without assigning any excuse, and from whatever motive, which he answered affirmatively. The learned judge then asked, whether in the opinion of the witness such a proceeding would be according to justice and equity, with the evident design

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of ascertaining whether the Jockey Club would be likely to sanction it with their approval, and whether a subscriber, acting from the fraudulent motive of winning wagers laid by him against his own horse, would be entitled to the award in his favour. The witness answered that such conduct in his own opinion would be most dishonourable. And it followed, from his own account of their regulations, that a subscriber so acting would incur disgrace and reprobation, though the regulation stated in general terms, on cross-examination, and without the qualification, might have led to the contrary conclusion.

We think this perfectly free from objection, and even necessary for arriving at the real meaning of the evidence.

Rule discharged.

Thursday,
February 8th.

The QUEEN v. WILLIAM SMITH, Clerk. (a)

Mandamus to defendant as vicar of the parish of St. Faith, Overbury, to restore the prosecutor to the office of clerk and sexton of the said parish. The return, after alleging the right of the de-

fendant as vicar to remove for lawful cause, and upon any vacancy legally arising to nominate, appoint and admit a legal and discreet person in that behalf, stated the dismissal of the prosecutor by the defendant for various acts of misconduct, alleging them to have been done by the prosecutor in the presence and hearing of the defendant, and also the appointment of another person by the defendant in his place. The prosecutor, in his first plea, admitted the right as alleged by the vicar, and the appointment of another person as clerk in his place, but pleaded *de injuriâ* as to the residue of the return; and pleaded, secondly, that he was not before the removal from his office summoned by the defendant to answer or explain the charges and cause of dismissal. Demurrer.

Held, first, that the return was bad, for not shewing that the prosecutor had had an opportunity of answering the charges made against him before dismissal; secondly, that the second plea only admitted the truth of the charges for the purposes of that plea, and that the whole record shewed no such admission, as the truth of the charge was put in issue by the plea *de injuriâ*.

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The defendant in his return alleged that on a certain day, to wit, &c. he was duly presented to and inducted into the vicarage of St. Faith, Overbury, in the county of Worcester, and thereupon became and was and thence hitherto had been and still was the vicar of the said parish; that during all the time aforesaid the divine service of the Church of England had been celebrated by him as such vicar as aforesaid, according to the custom and order of the said Church and according to the rubric in that behalf, in the parish church of the said parish; and that during all the time aforesaid and from time whereof the memory of man runneth not to the contrary, there had been and of right ought to be a clerk of the said parish, who of right had held and enjoyed and of right ought to hold and enjoy the office of sexton of the said parish as appurtenant to the said office of clerk of the said parish, and that during all the time aforesaid it of right belonged and appertained to the defendant as such vicar as aforesaid for lawful cause in that behalf from time to time to remove from the said office of clerk and sexton the person who for the time being might fill the same, and from time to time to nominate, appoint and admit to the said office of clerk and sexton of the said parish upon any vacancy legally arising therein a discreet and proper person in that behalf. It then went on to allege that at the time when the defendant became such vicar as aforesaid, and thence up to the time of his removal, the prosecutor was acting as clerk and sexton of the said parish, and that it was his duty as such clerk and sexton to say and pronounce in a decent and becoming and reverend manner the matters and responses which, according to the rubric, are appointed to be said or sung in churches by the people during the celebration of divine service in the church according to the book of common prayer of the Church of England, and which are usually said in the church of a parish by the clerk of such parish. That on divers days, whilst the defendant was such vicar and the prosecutor such

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clerk and sexton, (that is to say, setting out the specific days) the divine service, being the service of the Church of England appointed to be celebrated in churches on those days respectively, was celebrated in the parish church of the said parish of St. Faith, Overbury, in the county of Worcester, and that, in the celebration of the said service, the defendant as the vicar of the said parish officiated as the minister according to the rubric; and the prosecutor, as such clerk and sexton of the said parish as aforesaid, said and pronounced the matters and responses which, according to the rubric, should be said by the people and which are usually said in the church of a parish by the clerk of such parish, and that on divers of the said days, to wit, &c. (setting out the days), the prosecutor, in the course of the celebration of the said services respectively on the said days respectively, *in the presence and hearing of the defendant, did designedly and of purpose* say and pronounce the matters and responses, which it was his duty to say and pronounce in the course of the celebration of the said services, in an indecent and unbecoming and irreverent tone and manner, thereby wickedly and irreverently intending to move, and whereby he then did move, divers persons then present in the said church and of the congregation thereof during the celebration of the said services (whose names were not known to the defendant) to irreverent laughter in the said church during the celebration of the said services, and whereby divers and very many other persons then of the said congregation (whose names were unknown to the defendant) were greatly distressed and annoyed, and the defendant himself made ill and obstructed in the performance of his duties. That, on each of the said last-mentioned days and times, the defendant reproved the prosecutor because of the premises, and requested him not to repeat the aforesaid conduct in future. That the prosecutor did, nevertheless, on certain other of the said days on which the said services were celebrated as aforesaid, to wit (setting

out the days), *being after he had been guilty of the conduct last aforesaid, and after he had been reprov'd by the defendant*, notwithstanding such reproofs, in the celebration of the said services in the said last mentioned days respectively, *and in the presence and hearing of the defendant, with a wicked mind and designedly and of purpose*, again say and pronounce the matters and responses which it was his duty to say and pronounce in the course of the celebration of the said services on each of the last mentioned days respectively in an indecent, unbecoming and irreverent tone and manner, thereby wickedly and irreverently intending, &c. as in the former part of the return. It then went on to allege that on certain other of the said days on which the said services were celebrated in the said church as aforesaid, to wit (setting out the days), the prosecutor was, during and in the course of the celebration of the said services on the said last mentioned days, *in the sight and presence and hearing of the defendant*, drunk and intoxicated and affected by and with intoxicating drinks and liquors, and on each of those last mentioned days was, by reason of his said drunkenness and intoxication, and during and in the course of the celebration of the said services in the said church, *and in the presence and hearing of the defendant*, unable to say or pronounce the matters and responses so to be said by him as such clerk in a decent or becoming or reverent manner, and did not say or pronounce the same or any of them in a decent or becoming manner, but during and in the course of the said celebration of the said services on each of the said last mentioned days, *and in the presence and hearing of the defendant*, said and pronounced the said matters and responses in an unbecoming, indecent, ludicrous and ridiculous manner, and thereby made it known and apparent to all the congregation then in the said church and present at the said celebration of the said services, being very many persons, whose names were unknown to the defendant, that he the prosecutor was drunk and intoxicated, and thereby on each of those days moved divers and very many of the

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said congregation, whose names were unknown to the defendant, to indecent and irreverent laughter in the said church during the celebration of the said services on each of the said last mentioned days, and whereby divers and very many persons of the said congregation, whose names were unknown to the defendant, were greatly distressed and annoyed; that the defendant thereupon reproved the prosecutor in the last mentioned premises, and requested him not to be guilty of such conduct as last aforesaid in the future celebration of divine service in the said church. And that on divers others of the said days on which the said services were celebrated in the said church, to wit (setting out the days), being days *after he had been guilty of the conduct last aforesaid and had been so reproved by the defendant as last aforesaid*, the prosecutor, notwithstanding such last mentioned reproof, was, during and in the course of the celebration of the said services respectively on each of the said last mentioned days, *in the presence and hearing of the defendant, again drunk and intoxicated, &c.* (as in the former allegation). The return then went on to allege that on a certain day, to wit, &c. (the defendant then being such vicar and the prosecutor then being such clerk as aforesaid), the defendant prepared to administer in the said parish church of the parish of St. Faith, Overbury, aforesaid, the sacrament of the Lord's Supper, or holy communion, to divers members of the church. That on the said last mentioned day the prosecutor, well knowing the premises and that the defendant was then about to administer the said sacrament, presented himself at and made a noise and disturbance at the communion table of the said church at which the defendant was about to administer the said sacrament, whereupon the defendant then asked the prosecutor if he intended to partake of the said sacrament, and the prosecutor then in the said church *and in the presence and hearing of the defendant* said he did not intend to partake of the said sacrament, and thereupon the defendant then requested the prosecutor to leave the said communion table, and to cease

from making such noise and disturbance and to depart to a convenient distance from the said communion table, so that he might not obstruct the due and proper administration of the said sacrament to such as were willing to be partakers thereof, but the prosecutor then refused to depart from the said table and then continued to make such noise and disturbance as aforesaid for the space, to wit, of half an hour, and then remained so near to the said table and in such position in relation thereto and to the persons then willing to partake of the said sacrament for the space, to wit, of half an hour, whereby the prosecutor then did intend to obstruct, and whereby the prosecutor *then and in the presence and hearing of the defendant*, and in the said church and at the said communion table thereof, did thereby obstruct the due and proper administration by the defendant of the said sacrament to divers and very many members of the church who were then present at the said communion table willing to be partakers of the said sacrament, whose names are unknown to the defendant. And thereupon, after the said several premises, and for and because of the misconduct of the said *Thomas Harris* as such clerk and sexton as aforesaid, as above shewn and set forth, and before the issuing of the said writ, to wit, on the 5th day of March, in the year of our Lord 1843, the defendant did in due form of law remove the prosecutor from the said office of clerk and sexton, and after the said removal of the said *T. Harris* and before the issuing of the said writ, to wit, on the 1st day of March in the year of our Lord 1843, the said office of clerk and sexton then being lawfully vacant by the removal of the said *T. Harris* therefrom as aforesaid, the defendant nominated, appointed and admitted one *William Darke*, being a discreet and proper person in that behalf, to be the clerk and sexton of the said parish in lieu and instead of the prosecutor, which said *W. Darke* thereupon then became and was and thence continually hitherto hath been and still is the lawful clerk and sexton of the said parish.

Plea : And the said *T. Harris*, he being the person who sued and prosecuted the said writ of mandamus, comes, and

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admitting, as in the return mentioned, that the defendant was on a certain day, to wit, &c. duly presented to and inducted into the vicarage of St. Faith, Overbury, in the county of Worcester, and thereupon duly became and was and thence hitherto hath been and still is the vicar of the parish of St. Faith, Overbury, aforesaid, in the county aforesaid, and that during all the time aforesaid the divine service of the Church of England has been celebrated by him as such vicar as aforesaid, according to the customs and order of the said church, and according to the rubric in that behalf, in the parish church of the said parish; and that during all the time aforesaid, and from time whereof the memory of man runneth not to the contrary, there has been and of right ought to be a clerk of the said parish, which clerk for the time being, at all times from the time whereof the memory of man runneth not to the contrary, of right held and enjoyed and of right ought to hold and enjoy the office of sexton of the said parish as appurtenant to the said office of clerk of the said parish; and that during all the time aforesaid it of right belonged and appertained to him the said *William Smith* as such vicar as aforesaid, for lawful cause in that behalf, from time to time to remove from the said office of clerk and sexton the person who for the time being might fill the same, and from time to time to nominate, appoint and admit to the said office of clerk and sexton of the said parish, upon any vacancy legally arising therein, a discreet and proper person in that behalf; and that at the time when the defendant became such vicar as aforesaid, and thence up to the time of his the prosecutor's removal as aforesaid, he the prosecutor was the acting clerk of the said parish, and by reason of his being such clerk held and filled the said office of sexton of the said parish, and so was acting clerk and sexton of the said parish; and that during all the time while he the prosecutor was such clerk and sexton, it was the duty of him the prosecutor as such clerk and sexton to say and pronounce in a decent and becoming and reverent manner the matters and responses which, according to the rubric, are appointed to be said or

sung in churches by the people during the celebration of divine service in the church according to the Book of Common Prayer of the Church of England, and which are usually said in the church of a parish by the clerk of such parish; and that the defendant, being then vicar of the said parish, did, as in the latter part of the return mentioned, appoint and admit one *W. Darke* to be the clerk and sexton of the said parish in lieu and instead of him the prosecutor,—for a plea, nevertheless, in this behalf, saith, that the defendant did of his own wrong and without the causes by him in the residue of the said return alleged, remove him the said *T. Harris* from the said office of clerk and sexton of the said parish, and this the said *T. Harris* prays may be inquired of by the country.

And, for a further plea in this behalf, the prosecutor saith that he was not before the said removal from the said office of clerk and sexton summoned by the defendant, or any other person on his behalf, to answer or explain the charges and causes of dismissal in the said return alleged, or any or either of them, or his conduct in respect to the same. And this the said *T. Harris* is ready to verify, &c.

Demurrer. And as to the plea of the said *T. Harris* by him lastly above pleaded, the said *W. Smith*, clerk, says that the said last plea is not sufficient in law, and contains no matter sufficient in law to invalidate or avoid the cause shewn by the said *W. Smith*, clerk, in his said return for not restoring or causing to be restored the said *T. Harris* unto the said office of parish clerk and sexton of the said parish of St. Faith, Overbury, in the said writ of mandamus mentioned, together with all the fees, payments, privileges and advantages to the said place and office belonging and appertaining, and this the said *W. Smith*, clerk, is ready to verify as the Court shall award.

Kelly in support of the demurrer (a). The question raised

(a) During the term, January 24, before Lord Denman C. J., Patterson, Williams and Coleridge Js.

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for the decision of the Court is, whether the vicar has the power of dismissing the prosecutor, being his clerk, for the conduct stated in the return, which took place in his presence, without first summoning him to deny or explain the charges. The word "charge" is not properly introduced into the plea. If there had been a charge against the clerk, a summons and hearing might have been necessary. But here no charge was made, the vicar himself saw and heard all that took place; he could not compel parties to accuse the clerk or to support the accusation by testimony, but he was himself the witness of the fact as well as the judge of it. The distinction here is that the return does not allege a conviction on a charge of misconduct, but the fact of misconduct; and the admission in the plea is not that the prosecutor *was convicted* of doing the acts alleged, but that he *did them designedly*, and upon being reprimanded by the vicar repeated them under circumstances of aggravation. This is inconsistent with any defence, even that of insanity, for then the matter stated in the return would not be true, namely, that the prosecutor did those things designedly. Again, they are all alleged to have taken place in the hearing and presence of the vicar, which does away with the necessity for a summons and hearing. If a suitor were to strike a judge sitting in Court, and the judge were immediately to commit him, it could not be said that the committal was illegal because the offender had not first been summoned to answer the offence.

J. W. Smith in support of the plea. The only point is whether it was competent to the defendant to remove the prosecutor from his office of clerk without first giving him an opportunity of appearing and defending himself. It is submitted the facts alleged in the return are not well pleaded, without an allegation to that effect. It is said that the prosecutor has suffered no wrong, because his expulsion does not rest on any charge, but on the admitted fact of the commission of an offence, to which the defend-

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ant was an eye witness. But it is not impossible that the facts alleged were capable of explanation. The conduct of the prosecutor might have been the consequence of temporary aberration of intellect; or acts similar in their nature, though not to the same extent, might have arisen from an improper notion of his right to exclude certain persons from the communion. It is only necessary to suggest the possibility of a defence, for he was clearly entitled to the opportunity of stating any defence which by possibility could be open to him. But the return negatives that he was removed on the view of his misconduct by the vicar, for it is not alleged that he was dismissed till after repeated instances of misconduct, which he might and ought to have been summoned to answer. It is admitted in the argument for the defendant, that all the authorities shew that a summons to answer and opportunity of being heard is necessary, before a man can be expelled from his office: *Rex v. Gaskin* (a), *Rex v. Davies* (b), *Reg. v. Langley*, lately in this Court (c), all go to this extent. But it is endeavoured to distinguish this case, on the ground that the misconduct complained of, which, if true and incapable of explanation, would be sufficient to justify the defendant in depriving the prosecutor of his office, took place in the view and hearing of the defendant. In the report of the case of *Rex v. Gaskin* (a) the facts stated in the return are not set out at length, but it appears the clerk then had an opportunity of attending, but was not summoned, and Lord *Kenyon* says, "It is to be found at the head of our criminal law, that every man ought to have an opportunity of being heard before he is condemned, and I should tremble at the consequences of giving way to this principle." No exception is made of the case, when the fact which constitutes the offence is committed in the presence of the judge; *Baggs'* case (d) was there referred to: "Although a corporation have lawful authority, either by

(a) 8 T. R. 209.

(c) Trinity Term, 1843.

(b) 9 D. & R. 209.

(d) 11 Co. 99b.

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charter or prescription, to remove any one from the freedom, and that they have just cause to remove him; yet if it appears by the return, that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party, quia quicunque aliquid statuerit parte inaudita altera, æquum licet statuerit, haud æquus fuerit, and such removal is against justice and right." [*Patteson* J. referred to the provisions in the Highway Act, authorizing a justice of the peace to convict for certain offences upon his own view (a).] In that case the offender would have the same right of being summoned and heard, the only effect of the provision is to dispense with his evidence on oath. In *Painter v. Liverpool Gas Company* (b), a private act of parliament authorized the company to recover by distress, under the warrant of a justice, any rent due for gas supplied after a demand and ten days neglect or refusal to pay. The act did not require the party to be summoned before the issuing of the warrant, but this Court held that trespass lay against the clerk of the company, who had caused the plaintiff's goods to be distrained under such warrant without previously summoning and hearing the party distrained upon. [*Patteson* J. If the prosecutor had been dismissed by the defendant instantler, upon his misconducting himself in the manner alleged in the return, would that have been illegal, or could he in that case have complained that he had not been summoned?] It is submitted that such a course would have been improper, he might have been lawfully removed by the churchwardens from the church, if disturbing the congregation by his conduct, *Burton v. Henson* (c); but he could not have been deprived of his office without the opportunity of being heard in his defence. If his conduct were the consequence of mental incapacity, he could not answer at the moment, and there can be no necessity for a power in the vicar to dismiss instantler.

(a) 5 & 6 Will. 4, c. 50, s. 78;
13 Geo. 4, c. 78, s. 60.

(b) 3 Ad. & Ell. 433.
(c) 10 M. & W. 105.

Kelly in reply. If this plea is held sufficient, all the matter alleged in the return may be true, and yet the vicar is without remedy, for a peremptory mandamus must be awarded. But, if the plea is held bad, the truth of the facts may still be tried on the traverse de injuriâ. This could not have been the case at the time of the decision of *Rex v. Gaskin* (a). It is not suggested there that any of the acts complained of occurred in the presence of the vicar, and the return would be bad for omitting to shew that the cause of dismissal took place in his presence. The present case in no way interferes with the general rule there stated, but presents a state of facts which renders its application impossible. Where the party on his own shewing ought to have been dismissed, the rule can never apply; it is the same as if he had been dismissed at his own request, in such a case no notice or summons would be necessary. In this case there is in fact no other side to hear, the judge has seen the offence committed, and the offender admits that he has done the act. The cases of *Rex v. Davies* (b) and *Reg. v. Langley* (c) were decided on motion only, and the affidavits in both cases only disclosed that the clerk was charged in the presence of the vicar, not that the offence was committed in his presence.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—To a mandamus to restore the prosecutor to the office of parish clerk, the defendant, the vicar, returned that the prosecutor had on several occasions made the responses during divine service in a manner designedly irreverent and ridiculous, with the purpose of exciting laughter, and that he did excite it in some of those attending, to the great annoyance of others; obstructing the vicar in the discharge of his duty, and

(a) 8 T. R. 209.

(b) 9 D. & R. 209.

(c) Trinity Term, 1843.

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even making him ill : further, that the prosecutor had more than once appeared in church drunk and intoxicated, so as to be disabled from the proper performance of his duty, that the vicar reproved him for these offences, that ultimately he made an indecent disturbance at the altar, while the vicar was administering the sacrament of the Lord's Supper, and continued so to do in spite of remonstrance; all which acts the defendant alleges to have been committed in his own view, whereupon the defendant did "in due form of law remove him from his said office." To this return the prosecutor pleaded : 1st. that the defendant of his own wrong and without the cause alleged, removed him; 2nd. that the defendant did not before removing the prosecutor summon him to answer and explain the charges made against him. There was a demurrer to the second plea, but the argument turned at length on the validity of the return, the question being whether the vicar could lawfully remove the clerk under the circumstances of the case, without affording him an opportunity of making his defence.

For the vicar, it was contended, that, as he acted on his own view of the prosecutor's misconduct, any kind of process for enabling him to disprove or explain it must be superfluous; that the law invests the minister with the functions of accuser, witness and judge, obliging him to a constant supervision and control over his inferior officer, and to the exercise of his power of removing him for indecent conduct publicly exhibited in the minister's presence. The necessity of acting on his own impression in such a case was exemplified by punishment summarily inflicted by courts of justice for contempts there committed, and by convictions on the view by magistrates under the Highway Acts.

We believe, however, that the practice in the former of these supposed cases is for the Court to call on a party charged with contempt, for his defence, and give him the opportunity of denying or explaining it before any punishment is awarded. There may be an exception in the case

of actual drunkenness, which misconduct disables the party not only from governing himself with propriety, but also from entering into any vindication. To call on a drunken man to address the Court would be useless and injurious to himself, while it prolonged and aggravated the insult which his condition had already offered to it, and no adequate security exists against a repetition of the insult but imprisonment.

We apprehend also that a magistrate empowered to convict upon the view ought first to call on the offender. However rapid the proceeding, there must be time for stating the charge and receiving an answer. The driver seen riding in his waggon is *prima facie* a fit object of punishment; but if he shewed that he had been compelled to do so by a sudden fit of illness, or by some accident which prevented him from walking, he would avoid the penalty.

If it were otherwise in these cases, still we should think that sentence of removal from a freehold office ought to be preceded by some mode of inquiry, in which the accused should have the opportunity of bearing a part.

In the argument extreme cases were supposed, which might require an instantaneous proceeding. But, even in those cases, the only thing made necessary is the immediate removal of the person from the church where he creates the disturbance, and in the very worst that can be imagined, it is not difficult to conceive circumstances that would prove the absence of evil intention, and even of gross negligence. If required to explain his behaviour, the culprit might have convinced the vicar that what appeared highly incorrect, ought not to incur severe censure, much less expulsion from his office.

That important general principle, which was so strenuously asserted by Lord *Kenyon* in *Rex v. Gaskin* (a), "that every man ought to have an opportunity of being heard before he is condemned," has been often held sound and never

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(a) 8 T. R. 210.

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questioned. It was acted on in *Doe d. Earl of Thanet v. Gartham* (a), in *Rex v. Neal* (b), in *Rex v. The Vicar of St. James, Colchester* (c), in the same year, in the late case of *Reg. v. Governors of Darlington School* (d), and in many others. We do not think its application is excluded, because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, with the mitigation to which other facts might possibly entitle the accused, or with condonation of the offence. This principle appears to us valuable to the judge, whom it tends to secure against yielding too hastily to his own first impressions, which we think indispensable for the sake of the party charged in all cases to the due execution of every judicial power. Another ground was suggested for refusing a peremptory mandamus in the present case, that the prosecutor upon his own shewing ought to be removed from his office. The language of Lord *Kenyon* in *Rex v. Gaskin* (e) admits this principle, and reconciles that decision to it there by some former cases. To the same effect later authorities may also be found, especially in *Rex v. Griffiths* (f). But here the prosecutor, by pleading that he was not summoned, admits himself to be guilty of the conduct imputed for the purpose of that plea only, and as he takes issue upon it in the other plea, we cannot say that the whole record proves such admission. We must therefore form our opinion on the return, which, for the reasons given, we think cannot be supported.

Judgment for defendant.

(a) 1 Bing. 357.

(b) Easter Term, 1835.

(c) Michaelmas Term, 1835.

(d) Decided in Q. B. Hil. Vac.

1843, and in Exchequer Chamber,
 Mich. Vac. 1844.

(e) 8 T. R. 210.

(f) 5 B. & A. 731.

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Friday,

February 9th.

DUNN v. SAYLES.

MANNING Serjt. in Michaelmas Term last obtained a rule to shew cause why judgment should not be arrested on the first breach in the following declaration :

Covenant. The declaration stated, that by a certain deed made heretofore, to wit, on the 13th day of April, 1842, between defendant of the first part, one *John Dunn*, son of the plaintiff, of the second part, and *John Dunn* the elder of the third part, one part of which said deed, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is a certain day and year, to wit, the day and year aforesaid, the plaintiff, for the considerations thereafter particularly mentioned, did thereby for himself, his executors and administrators, covenant and agree to and with defendant, his executors, administrators and assigns, in manner following, that is to say, that *J. Dunn* the younger should and would, for and during the term of five years from the day of the date of said deed, serve, abide and continue with defendant, his executors, administrators and assigns, as his and their assistant in the art and mystery of a surgeon dentist, and diligently and faithfully exercise and employ himself in and do exercise and perform all such service, work and labour relative to the said art and mystery as defendant, his executors, administrators and assigns should from time to time order, direct and appoint to be done and performed in the way of his art and mystery of surgeon dentist during said term as aforesaid; and also that he *J. Dunn* the younger should and would endeavour by all due care and diligence to promote the interest of

Covenant. The declaration stated that by indenture between defendant of first part, *J. D.*, son of plaintiff, of the second part, and plaintiff of third part, plaintiff covenanted that his son should be assistant to the defendant, a dentist, for five years, and do all such service as defendant should order to be performed in the way of his art; that defendant, for the services to be done by the son, covenanted during the term, and in case the son should perform his part of the agreement, that he defendant would pay the son a certain sum weekly during the term as compensation for the services aforesaid.

That the son entered upon the service, and that he and the plaintiff performed their part of the agreement, and were ready and willing to continue such performance during the term.

Breach: that defendant refused to permit the son to continue in the service and dismissed him.

Judgment arrested on the ground that the breach was ill assigned, as the declaration contained no implied covenant by the defendant to retain the son in the service during the five years.

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defendant, his executors, administrators and assigns, and would faithfully and truly serve him and them without embezzling, losing or unlawfully making away with any goods, chattels or effects whatsoever of the defendant, his executors, administrators or assigns; and also that *J. Dunn* the younger, during the absence of the defendant, should well and faithfully assist in the management of the said art and mystery of surgeon dentist to the best of his ability and knowledge; and also that he *J. Dunn* the younger should not nor would take in, do or perform, either on his own account or for any other person or persons whomsoever, save the defendant, any manner of business relating to the said art and mystery of surgeon dentist, without the previous leave and consent of the defendant, his executors, administrators and assigns; and further, that he *J. Dunn* the younger should and would faithfully and diligently attend the work of the defendant for nine hours each day, and should not nor would absent himself from the service of the defendant without his leave and consent on any pretence whatsoever, save through sickness or some other unforeseen accident whereby he might be prevented attending the business of the defendant, and the defendant, for and in consideration of the services to be done and performed by and on the part of *J. Dunn* the younger as aforesaid, did, by the said deed, for himself, his heirs, executors and administrators, covenant, promise and agree with *J. Dunn* the elder, his executors and administrators, that he the defendant, his executors, administrators or assigns, should and would during the term of five years (and in case *J. Dunn* the younger should well and truly do and perform his part of the agreement, and particularly the work and labour for nine hours per day as thereinbefore stipulated, but not otherwise), well and truly pay or cause to be paid unto *J. Dunn* the younger the several weekly sums thereafter mentioned (that is to say), the sum of 35s. weekly and every week for the first year of the said term, the sum of 2*l.* weekly and every week during the second and third years of the said term, and the

sum of 2*l.* 2*s.* weekly and every week during the fourth and fifth years of the said term, for wages and compensation for the services aforesaid, as by the said deed, reference being thereunto had, will (amongst other things) appear. That *J. Dunn* the younger, before and at the time when the said deed was made as aforesaid, was in the service of the defendant as an assistant in his the defendant's said art and mystery, and that after the making of the said deed as aforesaid, to wit, on the 13th day of April, 1842, he *J. Dunn* the younger, under and subject to the said deed and upon the terms thereof, was in the service of the defendant as such assistant as aforesaid, and commenced his service as such assistant, under and subject to the said deed and upon the terms thereof, for the said term of five years in the said deed mentioned, and that *J. Dunn* the younger remained and continued in the said service of the defendant as such assistant as aforesaid from the time of making the said deed until he was dismissed and discharged as hereinafter mentioned, to wit, until a certain day after the making of the said deed, during the said term and before the commencement of this suit, to wit, the 5th of October, 1842.

Averment of performance by the plaintiff and *J. Dunn* the younger during the term of actual service, and of their readiness, &c. to continue performance until the end of the stipulated term.

Breach: that the defendant, after the making of the said deed, during the said term of five years and before the commencement of this suit, to wit, on the day and year last aforesaid, wholly *refused to suffer* or permit the said *J. Dunn* the younger any longer *to remain or continue in his the defendant's service*, or to serve him as such assistant as aforesaid, according to the deed in that behalf, or any longer to observe, perform or fulfil the said deed as such assistant as aforesaid, or to do or perform his part of the said agreement; and then, after the making of the said deed, during the said term of five years, and before the commencement of this suit, to wit, on the day and year last aforesaid, dismissed and discharged *J. Dunn* the younger from and out

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of the service and employ of the defendant, under and subject to the said deed, and hath from thence until the commencement of this suit, being divers, to wit, three weeks, wholly refused to suffer or permit *J. Dunn* the younger to be in the service or employment of the defendant, or to serve him or do or perform his duty as such assistant as aforesaid, according to the said deed in that behalf, by means whereof, for and during all that time, being divers, to wit, three weeks, *J. Dunn* the younger hath been and was prevented from earning and coming entitled to, and hath not obtained or received from the defendant, and the defendant hath not paid or caused to be paid to *J. Dunn* the younger, any weekly sum or sums, or any money whatsoever, contrary to the said deed and to the said covenant of the defendant by him in that behalf made as aforesaid.

The plaintiff having obtained a verdict with 38*l.* damages, on the breach above assigned,

Manning Serjt. obtained a rule nisi for arresting the judgment, on the ground that the declaration did not shew that there was any covenant by the defendant to continue *Dunn* the younger in the defendant's service, and that therefore the dismissal of *Dunn* the younger, which was the breach assigned, could give no cause of action.

Platt and *Peacock* now shewed cause (a). The declaration certainly does not set out any express covenant on the part of the defendant to continue to employ *Dunn* the younger, but it discloses an implied covenant to that effect. The plaintiff covenants that his son shall serve for five years, and the defendant covenants to pay for the service throughout the term. These two covenants of necessity involve a covenant by the defendant to employ for the whole term, just as the word "demise" involves a covenant for quiet enjoyment. In *Pordage v. Cole* (b) it was held that if it be "agreed" between A. and B. that B. shall pay A. a sum of money for his lands, these words amount

(a) During term, Jan. 18, before *Coleridge* and *Wightman* Js.
 Lord Denman C. J., *Patteson*, (b) 1 Saund. 819.

to a covenant by *A.* to convey the lands. [*Coleridge J.* Should you not have set out the covenant which you say is to be implied?] No, for the covenant is a conclusion of law from the rest of the deed. In case for a breach of duty, it is not necessary to allege the duty; it is sufficient if it can be collected from the facts stated in the declaration: *Lancaster Canal Company v. Parnaby (a)*.

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Manning Serjt. and *J. Henderson* contrâ. A covenant to employ on the one side is not necessarily to be inferred from the covenant to serve on the other. This has recently been decided by this Court in *Williamson v. Taylor (b)*, which was a case of a colliery pit bond. In the case of a guarantee for payment of goods, to be supplied to a third person, there is no undertaking to supply the goods; the undertaking is to pay for the goods, if they are supplied. So in the present case, the defendant undertakes to pay for the service if *Dunn* the younger is employed, but he does not undertake to employ. The defendant agrees to pay for five years, if the service is so long. In *Pordage v. Cole (c)* the word "agreed" was taken to be the word of both parties. The covenant to pay if the service is rendered does not exclude the right of the defendant to dismiss. If the son was wrongfully dismissed, the defendant is liable; but it is not alleged that he did wrongfully dismiss. If the action had been brought for wrongfully dismissing, the defendant would be entitled to shew that he had good reason for dismissing. But this declaration is so framed that the defendant cannot go into the grounds of the dismissal. It would therefore be a great hardship to hold that the declaration contains an implied covenant to employ, when the defendant has no opportunity of justifying the dismissal. If the declaration had alleged the covenant to employ, the defendant might have traversed it and raised the question. [*Patteson J.* referred to *Sampson v. Eas-*

(a) 11 A. & E. 243; S. C. 3 P. & D. 172.

(c) 1 Saund. 319.

(b) *Ante*, 398.

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terby (a).] There the covenant on the part of the defendant was implied, not from any alleged correlative covenant on the other side, but from his own covenant. An indenture of lease recited an agreement to pull down an old mill and to build a new one, and then contained a covenant by the lessee to repair the new mill and to leave it in repair; and from this, the lessee's own covenant, the Court implied a covenant by him to build the new mill.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court, and said that the reasons given for the judgment of the Court in *Aspin v. Austin (b)* applied to the present case, and that the judgment therefore must be arrested.

Rule absolute.

(a) 9 B. & C. 505; S. C. 4 M. & R. 422.

(b) *Ante*, 515.



Saturday,
 February 10th.

PITCHER v. KING, Esq.

A count in case against a sheriff, alleging that the plaintiff had recovered a judgment against *H. B.*; that there were goods and

CASE against the sheriff of Sussex. The third count stated that the plaintiff, on the 9th June, 1836, had recovered against *Humphry Bean* a judgment for a debt of 36*l.* 7*s.* 7*d.* and 9*l.* 5*s.* damages and costs, in the Queen's Bench; that the plaintiff, on July 11th, obtained a writ of fieri facias, directed to the sheriff, indorsed to levy 23*l.*

chattels of *H. B.* in the sheriff's bailiwick of which he might have levied, but that he had not the monies ready, &c., but falsely returned that he had seized the goods of *H. B.*, which remained with him unsold for want of buyers: *Held* good on general demurrer, as a complaint that the sheriff might have levied and neglected to do so.

Plea to this count, that the defendant, as sheriff, took certain specified goods of *H. B.*, and also certain other goods of *H. B.*, and held them until the plaintiff directed him to withdraw from the possession of all the goods so named, except the specified goods; that he then withdrew from the possession of all the goods so levied except the specified goods; and that the specified goods did remain unsold in his possession for want of buyers: *Held* bad on demurrer, as not answering the whole complaint, for want of shewing that *H. B.* had not still other goods within the bailiwick of which the monies might have been levied.

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17s., and 1*l*. for the writ and warrant; that there were goods and chattels on which the sheriff might have levied; yet the said defendant, so then being such sheriff as aforesaid, not regarding his duty as such sheriff, but contriving to injure the plaintiff, &c., had not the monies before the king at Westminster, according to the exigency of the writ, nor hath paid the same to the defendant, and would not levy the monies, but falsely returned that he had seized and taken the goods and chattels of the said *H. Bean*, the value of which was to him unknown, which goods and chattels remained with him unsold for want of buyers. Damages 50*l*. Plea to this count, that after the delivery of the said writ of fieri facias to him the defendant as in that count is mentioned, and before making the said return upon the said writ of fieri facias as in that count is also mentioned, to wit, on the 11th of July, 1836, the defendant, so being such sheriff as in that count is mentioned, did seize and take in execution, under the said writ of fieri facias in the said last count mentioned, one bed, one bolster, two pillows, and one table, of the goods and chattels of the said *H. Bean*, besides other goods and chattels of the said *H. Bean*, and which said bed, bolster, pillows, and table, and which said other goods and chattels of the said *H. Bean* were, at the time of the seizing and taking the same as aforesaid, found within his the defendant's bailiwick; and that the defendant, as such sheriff as aforesaid, then took and had, held and retained possession of the same in execution under the said writ of fieri facias in the same last count mentioned, from the time of the seizing and taking the same in execution as aforesaid thenceforth continually until afterwards, and before the making of the said return upon the said writ of fieri facias in the said last count mentioned, to wit, until and upon the said 20th of July, 1836, when the defendant withdrew, as hereinbefore mentioned, from the possession of all of the said goods and chattels of the said *H. Bean*, so seized and taken by him the defendant in execution as aforesaid, except the said

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bolster bed, pillows and table. And the defendant further says, that afterwards and before the making of the said return upon the said writ of fieri facias as in the said count mentioned, and whilst the defendant, so being such sheriff as aforesaid, held and retained possession of the said bed, bolster, pillows and table, and of the said other goods and chattels of the said *H. Bean* so seized and taken by him the defendant in execution under the said writ of fieri facias as aforesaid, to wit, on the said 20th of July, 1836, the plaintiff commanded and directed the defendant to withdraw from the possession of all of the goods and chattels of the said *H. Bean* so as aforesaid seized and taken by him the defendant in execution under the said writ of fieri facias in that count mentioned, save and except the said bed, bolster, pillows and table; whereupon he the defendant did then, to wit, upon the day and year last aforesaid, immediately, in obedience to the said command and in pursuance of the said direction of the plaintiff, withdraw from possession of all the said goods and chattels of the said *H. Bean* so as aforesaid seized and taken by him the defendant in execution under the said writ of fieri facias in the said last count mentioned, save and except the said bed, bolster, pillows and table; and because the defendant, so being such sheriff as aforesaid, was always, from the time when he withdrew from possession as aforesaid, to wit, on the day and year last aforesaid, until, at, and after the time of making the said return upon the said writ of fieri facias in the said last count mentioned, to wit, until, at, and after the said 17th day of October, 1836, in the said count mentioned, unable to find and procure any buyers thereof, the said bed, bolster, pillows and table remained and continued all that time in the possession of the defendant as such sheriff as aforesaid in execution under the said writ of fieri facias in the last count mentioned. And the defendant avers, that at the time of the making of the said return upon the said writ of fieri facias by the defendant as in the last count mentioned, to wit,

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upon the day and year last aforesaid, the said bed, bolster, pillows and table, being of a value unknown to the defendant, remained and were in possession of the defendant as such sheriff as aforesaid in execution under the said writ of fieri facias in the last count mentioned, for want of buyers. Wherefore he the defendant, so being such sheriff as aforesaid, at the said time in the said last count mentioned, to wit, on the 17th October, 1836, did make the said return upon the said writ of fieri facias in the said last count mentioned, as he lawfully might for the cause aforesaid. Verification.

To this plea the plaintiff new assigned, that he proceeded against the defendant, not because he did not levy the monies in question of the goods and chattels from the possession of which he, the plaintiff, withdrew, but both because he, the defendant, did not levy the monies of the said bed, bolster, pillows and table; and also because there were other goods and chattels of *H. Bean*, other than those in the plea alleged to have been levied and taken in execution within his bailiwick, of which he the defendant might have levied the said monies.

General demurrer to the new assignment. The principal points stated for the defendants were:— 1. That the new assignment endeavours to extend and enlarge instead of explaining the count, and endeavours to make that count apply to other goods of *H. Bean* than those comprehended in it. 2. That if there were any such goods, they could not be seized without a new fieri facias, which the new assignment does not and could not allege. 3. That all the matter of the new assignment is or ought to be comprised in the last count, and that the same is fully confessed and avoided in the last plea of the defendant. 4. That the last count of the declaration is bad in not shewing how or in what respect the return is false, or that it is false at all; and that the sheriff did not seize and take all the goods of *H. Bean*, or that the value thereof was known to him, or that the goods did not remain in his hands for want of buyers, or that he sold

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them or could have sold them before the return, or before the commencement of the suit; or whether the defendant did or did not seize all the goods, or that he had levied the debt and damages, or that a reasonable time for selling or levying had elapsed before the return or commencement of the suit, &c. Joinder in demurrer.

Peacock(a), in support of the demurrer, objected to the sufficiency both of the new assignment and declaration.

Crompton contra. The plea is bad. The action is for the sheriff's falsely returning that he had seized the goods of *Bean*, which remained with him unsold for want of buyers. To this the plea answers, that the defendant seized and took certain specified goods and chattels, besides other goods and chattels not specified, of *Bean*; that the plaintiff directed him to withdraw from the possession of all the unspecified chattels; that he did withdraw accordingly; and that the remaining or specified goods and chattels did remain with him unsold for want of buyers. This is an incomplete answer. It is consistent with all the facts alleged in this plea, that there may have been yet other goods of *Bean*, seized by the plaintiff, besides those from which the possession of which he withdrew, and the bed and other specified articles, and that out of those he might have levied the monies. The fallacy lies in assuming that it is a sufficient answer to the complaint, to shew that there were some goods which plaintiff himself desired defendant not to seize. *Haydon v. Thompson(b)*, *Wheeler v. Senior(c)*.

Peacock in reply. The plaintiff himself has commanded the sheriff to give up a portion of the goods and chattels.

(a) This case was argued on January 23rd, before Lord *Denman* C. J. *Patteson*, *Coleridge* and *Wightman* Js.

(b) 1 A. & E. 210; S. C. 3 N. & M. 319.

(c) 7 M. & W. 562.

The plea states in effect that the sheriff gave them up accordingly, and that the consequence was that he was not able to levy the monies of the remainder. [*Patteson J.* The question seems to be, on which party does the onus lie of shewing that the goods from which the defendant withdrew, and those which he was unable to sell, exhausted the whole stock on which the levy could be made.] (The argument as to the validity of the plaintiff's pleadings is omitted.)

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Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—His Lordship read the count and plea. A new assignment was pleaded, averring that plaintiff did not proceed for defendant not levying on the goods from which he so withdrew, but because he did not levy the debt of the goods so seized, and other goods the property of the debtor, which defendant might have seized. To this there was a demurrer, on which considerable discussion took place. But plaintiff also objected to the validity of the plea; and we are of opinion that the objection must prevail. The declaration is somewhat confused, and appears to involve several grievances; we hold it good, as a complaint that the sheriff might have levied, and neglected to do so.

The answer given by this plea is, that plaintiff himself directed defendant to withdraw from the possession of certain goods of the debtor which he had seized, and that certain other goods of the debtor, which he also seized, remained in his hands unsold for want of buyers. And both these propositions may be true, and the declaration also.

There may have been goods of the debtor of which the debt ought to have been made, notwithstanding this account of those which actually came to the sheriff's hands. To render these two propositions available as a defence, it was obviously incumbent on defendant to shew that they accounted for all the debtor's goods within the bailiwick, or

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that the goods seized were sufficient to satisfy the execution; for his duty was to possess himself of all or so many as were sufficient. Our judgment must therefore be for plaintiff(a).

Judgment for plaintiff.

(a) See the report of the judgment in a former action, arising out of the same proceedings, *Pitcher v. King*, 9 Ad. & E. 288; S. C. 1 P. & D. 297.

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 YORKSHIRE.

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Scmble, that under 1 Will. 4, c. 21, the court has power to order the costs of the application for a writ of mandamus to erase an entry of quarter sessions, enter continuances, and hear an appeal, and of the writs, to be paid by the parish officers of the respondent parish, where the justices have made a return to the writ, which has been supported on behalf of the respondents, and on which a peremptory mandamus has been awarded, issued, and obeyed.

IN this case a peremptory mandamus (a) had issued to the justices to erase, or cause to be erased, from the records of the quarter sessions, an entry of an appeal against an order of removal, on the 25th October, 1841, (*Crich* appellants, *Sheffield* respondents,) and the order of the court confirming it; and to enter an appeal as of Midsummer sessions, 1842, to enter continuances, and hear it at the next sessions.

The appeal was accordingly entered and heard, and the order of removal quashed on the merits.

In Michaelmas Term, 1843, *Whitehurst* obtained a rule nisi against the churchwardens and overseers of Sheffield, for the costs occasioned by the applications for the original and peremptory writs of mandamus, the costs of the writs, and of the present application, against which

Pashley shewed cause in Hilary Term, 1844 (b). In

(a) See *Reg. v. Justices of West Riding*, 5 Q. B. 1; S. C. 3 G. & D. 170.

(b) On January 31, before Lord Denman C. J., *Patteson*, *Coleridge*, and *Wightman* Js.

But the Court refused to make such an order in a case where the original entry had been made in pursuance of an established although improper practice of the quarter sessions.

this case the parish officers of the appellant parish applied at the Midsummer Quarter Sessions, 1842, to erase the entry of the confirmation of the order. This, according to the opinion expressed by the judges of this Court, the justices could not do without the direction of the Court; they have no power over the record without such authorisation; *Lamb. Eiren.* b. 1, c. 13, p. 64; *Co. Litt.* 260, a.; *Rex v. Carlile (a)*. If their application had been to enter and respite the appeal, the case might be different; as it was, the justices only acted in accordance with a long-established practice; and though the general rule in such cases is to give costs, *Reg. v. The Mayor, &c. of Newbury (b)*, the discretion of the court will be differently exercised in a case of doubt; *Rex v. The Commissioners of the Thames and Isis Navigation (c)*.

But secondly, the Court has no power to award part of these costs, namely, the costs of the writs, under stat. 1 Will. 4, c. 21, s. 6, which is the only foundation of their authority. That section provides that the costs of the writ shall be in the discretion of the court only "if the same shall be issued and obeyed." Here the writ was issued, but not obeyed, a return was made, and a peremptory mandamus awarded; *Reg. v. Fall (d)*. Again, the parish officers of Sheffield are not parties to the record, but the justices; and the only case in which a party who is neither prosecutor nor defendant is liable for the costs of the writ, is under section 4, where others than the nominal parties are directed by the Court to shew cause.

Whitehurst contra. Under section 6, the Court is authorised to order and direct by whom and to whom the costs of the writs shall be paid; words clearly large enough to enable the Court to direct them to be paid by the parties really interested, although not nominally parties; and there

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(a) 2 B. & Ad. 971.

(c) 5 A. & E. 804, 816.

(b) 1 Q. B. 751, 765; S. C. 1
G. & D. 388.

(d) 1 Q. B. 636; S. C. 1 G. &
D. 117.

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can be no question that the writ has been "issued and obeyed," where a peremptory writ has been rendered necessary by the intervention of a return, as much as if obeyed in the first instance; and such was the course taken in *Reg. v. St. Saviour's, Southwark (a)*. Here the return was really defended on behalf of the respondents.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—The words of the statute 1 Will. 4, c. 20, s. 6, are very large, and may be sufficient to bring the parish officers of Sheffield within reach of this application. But the entry in this case was made by the justices in pursuance of an established, although improper, practice of the sessions; we think, therefore, that the parish officers of Sheffield ought not to be made to pay the costs of proceedings occasioned by the conduct of the justices acting under known rules. The rule must be discharged, but without costs.

Rule discharged without costs.

(a) 7 A. & E. 925; S. C. 3 N. & P. 126, 354.

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YOUNG v. HICHENS.

Plaintiff and
 defendant
 were owners
 of boats em-
 ployed in a
 fishery. Plain-
 tiff's boat
 cast a fishing
 sear round a
 shoal of
 mackerel, with
 the exception
 of a compara-

TRESPASS. The declaration charged that the defendant seized, took and disturbed a certain fishing sear and net of the plaintiff, which the plaintiff had then thrown and cast into the sea for fish, and by and within which sear and net the plaintiff had then taken and inclosed and then held inclosed in his own possession in the sea a large number of fish, to wit, 2,000,000 mackerel of great value, to wit, of the value of 2000*l.*, and the defendant, with force and

tively small opening which the sear did not quite fill up, but through which, in the opinion of witnesses, the fish could not escape. Defendant's boat then came in through the opening, and took the mackerel. *Held*, that the plaintiff could not maintain trespass for taking his fish, his possession not having been complete.

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arms, &c. then cast and threw a certain other fishing sean and net within and upon the said sean and net of the plaintiff, and then and for a long time, to wit, for twenty days, in a forcible manner and with strong hand hindered and prevented the plaintiff from dipping and taking the said fish so taken and inclosed by him out of his said sean and net as he the plaintiff would and might otherwise have done. And the defendant, with force and arms, &c then drove, chased and hurried divers, to wit, 1,000,000 of the said fish, then being the fish of the plaintiff, of great value, to wit, of the value of 2000*l.*, by means of which said several premises the defendant hindered and prevented the plaintiff from dipping and taking the said fish so taken and inclosed by the plaintiff in his said sean and net therefrom and thereout for a long time, to wit, for twenty days, and thereby divers, to wit, one-fourth part, of great value, to wit, of the value of 500*l.*, during that time died, and divers others, to wit, two-fourth parts of them, of great value, to wit, of the value of 1000*l.*, escaped from and out of the said sean and net of the plaintiff and were wholly lost to the plaintiff, and divers others, to wit, one-fourth part of them, of great value, to wit, of the value of 500*l.*, were thereby greatly damaged and injured, and the plaintiff by means of the premises lost divers great gains and profits, to wit, to the amount of 2000*l.*, which he might and otherwise would have made from and of the said fish. And also thereby during that time the said sean and net of the plaintiff was by the waves and action of the sea greatly injured and damaged, to wit, to the amount of 200*l.*, and thereby also the plaintiff was put to great expence of his monies, to wit, 200*l.* in the necessary employment of divers, to wit, fifty men, for the purpose of watching, protecting and saving the said fish whilst he the plaintiff was so hindered and prevented by the defendant from dipping and taking the same out of the said sean and net of the plaintiff as aforesaid. Second count, for that the defendant, with force and arms, &c. seized and took divers goods, chattels and fish, to wit, 2,000,000 of

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mackerel of the plaintiff, of great value, to wit, of the value of 2000*l.*, and then converted and disposed of the same to his own use, and other wrongs to the plaintiff then did, against the peace of our Lady the Queen.

Pleas: 1. Not guilty. 2. As to so much of the first count of the declaration as charges the defendant with hindering and preventing the plaintiff from dipping and taking the said fish, so alleged to have been inclosed in his own possession and taken and inclosed by him as in the first count mentioned, out of his said sean and net, and with driving, chasing and hurrying the said fish in the said first count mentioned, that the said fish were not the fish of the plaintiff; nor was the plaintiff possessed of the same, *modo et formâ*. Issue tendered. 3rd plea to the second count, that the goods, chattels and fish therein mentioned were not the plaintiff's. The 4th and 5th plea, as to so much of the first count as related to the disturbing the fishing sean and net of the plaintiff, and throwing another fishing net on it, and hindering and preventing the plaintiff from taking the fish, set up certain special defences under the provisions of two acts of parliament, 16 *Geo.* 3 and 4 *Vict.*, "For the Encouragement and Improvement of the Pilchard Fishery carried on within the Bay of St. Ives, in the County of Cornwall," alleging certain breaches of the provisions of those acts by the plaintiff, which justified the trespasses complained of. Issue joined.

The plaintiff in this action represented, by agreement between the parties, a fishing company entitled *The Victoria Company*: the defendant another entitled *The Hichens Company*.

At the trial before *Atcherley* Serjt. at the Bodmin Spring Assizes, 1843, the following facts were in evidence:—On the day in question a very large shoal of mackerel came into the bay of St. Ives. The plaintiff's boat, the *Wesley*, put out, and shot her sean, not conducting herself at that time, as the defendant alleged, according to the regulations of the fishery. The sean, nearly 140 fathoms long, was drawn in

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a semicircle completely round the shoal, with the exception of a space of seven fathoms according to the plaintiff's witnesses, ten fathoms according to the defendant's, which was not filled up by it. In this opening, according to the plaintiff's witnesses, the fishermen in the plaintiff's boat were splashing with their oars and disturbing the water in such a manner that, as they affirmed, the mackerel within would have been effectually prevented from escaping. At this conjuncture, before the plaintiff could draw his net closer, the Ellen, the defendant's boat, rowed in through the opening thus made, shot her sean, inclosed the fish, and captured the whole of them. It was argued for the defendant at the trial that, in the first place, this did not constitute such a possession by the plaintiff as would entitle him to maintain trespass, and there was, therefore, no case to go to the jury; in the next place, that if it did, and the plaintiff was possessed of the fish within the meaning of the 2nd and 3rd issues, the defendant could justify his interposition in consequence of the plaintiff's violation of the statutes. The learned serjeant left six questions to the jury; one was, whether the fish were the fish of the plaintiff and in his possession, when the defendant took them; the jury found that they were. The other five related to the conduct of the plaintiff and defendant with reference to the regulations of the statutes. The learned serjeant also directed the jury to find what amount of damage was done to the plaintiff's boat and net, which the jury estimated at 1*l*. On the answer returned to these questions the learned serjeant directed the verdict to be entered for the plaintiff on all the issues; damages, 569*l*. (the value of the fish caught and 1*l*. for the damage done), with leave for the defendant to move to have the verdict entered for him on the 2nd and 3rd issues, if the Court should be of opinion the fish were not in the plaintiff's possession; on the 4th and 5th, if the Court should be of opinion that they were, but that the two last pleas afforded a justification; and to reduce the damages on the first issue, "not guilty," to 1*l*. in either event.

A rule nisi having been accordingly obtained,

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Cockburn and *M. Smith* now shewed cause. The first question is, whether or not the plaintiff was possessed of the fish when the alleged trespass took place. That was a question of fact, to be determined by the jury. The sean was ready to be closed when the defendant's boat came up. Whether or not it was so far closed that the fish were virtually in the possession of the plaintiff, so that this action would lie, is a question so entirely of circumstances that no judicial rule can be laid down respecting it. It is impossible to say what amounts to the capture of a wild animal or animals by any general principle to be established beforehand.

There is, however, no general rule of law, from which it follows that this was not a complete capture. The principle of the civil law is thus laid down in 2 *Justin. Inst.* lib. 2, tit. 1, s. 12, "de occupatione ferarum." "Feræ igitur bestiæ, et volucres, et pisces, et omnia animalia, quæ mari, cœli, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt Quicquid autem eorum ceperis, eo usque tuum esse intelligitur, donec tuâ custodiâ coercetur. Cum vero tuam evaserit custodiam, et in libertatem naturalem sese receperit, tuum esse desinit, et rursus occupantis fit." So *Digest*, lib. 40, tit 1, s. 12. *Bracton*, lib. 2, c. 1. "Occupatio," therefore, for this purpose, seems to be synonymous with "custodia." He who has brought the animal into his "custody" so that he cannot escape, has completed his "occupatio." And by the law of Scotland, "the right to wild beasts or to fowls and fishes is acquired by occupancy, unless they have been previously deprived of their natural liberty, as by inclosing deer in a park, fishes in a pond, or birds in an aviary; but when, by any accident, they have regained their natural liberty, and the former proprietor has given over his pursuit of them, the right to them may, as before, be acquired by occupancy:" *Bell's Dictionary of the Law of Scotland*, vol. ii. 103. "It is the first seizure that introduceth property, and not the first attempt and prosecution, as he who pursueth or woundeth a wild beast or fowl or

fish is not thereby proprietor, unless he had brought it within his power, as if he had killed it or wounded it to death, or otherwise given the effectual cause whereby it cannot use its native freedom; as at the whale fishery at Greenland, he that woundeth a whale so that she cannot keep the sea for the smart of her wound, and so must needs come to land, is proprietor, and not he that first lays hand on her at land. Though the falling in upon another's game when he alone is in prosecution, may be uncivility or injury, yet it hindereth not the constitution of property, *though it be a just ground to annul the right of the first possessor, and make him restore to the first prosecutor, if he continue his pursuit with a probability to reach his prey:*" *Stairs' Inst.* book 2, tit. 1, s. 32. If the analogy of this law were to prevail, undoubtedly the plaintiff, who was the first "prosecutor," and had reduced the object of pursuit to a situation from which it could not escape, could not be divested of his property by the defendant's taking possession." The custom of the Greenland whale fishery, founded on this doctrine, is stated in *Hogarth v. Jackson (a)* and *Skinner v. Chapman (b)*, to be, that the first striker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured her without the interference of the second striker; varying from that stated in *Littledale v. Scaith (c)*. The only case applicable to the subject which rests on the general law of England, is *Churchward v. Studdy (d)*, where it was held that plaintiff having pursued a hare into defendant's ground, and a labourer having caught up the hare before the dogs had actually seized it, the property in the hare was in the plaintiff, but there was undoubtedly another feature in that case, viz. that the labourer's evidence was, that he took it up with the purpose of assisting the hunters.

(The argument on the other points is omitted.)

(a) 1 M. & M. 58.

(b) 1 M. & M. 59.

(c) 1 Taunt. 243, n.

(d) 14 East, 249.

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Crowder contra. The question really is, whether nearly catching a fish amounts to the same thing, as regards the acquisition of property, as actually catching it. No English law book at all events admits the position that property can be acquired unless the taking is complete. The language of *Bracton* is "*Nec sola persecutio facit rem esse meam. Nam etsi feram bestiam vulneraverim ita ut capi possit, non tamen est mea nisi eam cepero, imo erit potius occupantis, quia multa accidere solent ne capias.*" If an animal, once taken, escapes, the property having once vested is not lost, nor acquired by a subsequent taker. But this is quite a different proposition from that contended for, which is, that where an animal *nearly* taken escapes, the subsequent taker does not gain the property. In *Churchward v. Studdy* (a) the fact on which the decision turned was, that the labourer had taken up the hare to assist the hunters "as an associate of them." But Lord *Ellenborough* continues, "If, indeed, he had taken it up for the defendant before it was caught by the dogs, that would have been different; or, even if he had taken it as an indifferent person, in the nature of a stakeholder." The opinion of his lordship may, therefore, be taken as an authority against the plaintiff in this case.

Butt, on the same side, was stopped by the Court.

LORD DENMAN C. J.—It certainly results from the evidence in this case, that the fish were reduced to a condition in which it was in the highest degree probable that the plaintiff would become possessed of them. But it is equally certain that he had not become possessed. Whether the necessary possession be rightly described by the word "*custodia*" or "*occupatio*," I think it is not attained until the plaintiff has brought the animals into his actual power. It may be, indeed, that the defendant has committed a tor-

(a) 14 East, 249.

tious act in preventing the plaintiff from completing his possession.

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PATTESON J.—I do not see how we can say this action is maintainable, unless by holding that a person on the point of taking possession of a thing is actually in possession of it. Whether a different action would not lie, I do not determine.

WIGHTMAN J.—If the property in the fish vested in the plaintiff, while there was a partial opening remaining between the two ends of the sean, he would be entitled to maintain trover for fish which had escaped through that very opening.

Rule absolute to enter verdict for defendant on second and third issues.

Subsequently, in Trinity Term, 1844, *M. Smith* obtained a rule to shew cause why a nonsuit should not be entered, or the action discontinued on payment of costs. The ground of this application was, that the decision of this Court, on the motion for a new trial, turned on a point not anticipated on behalf of the plaintiff. The declaration alleged that the fish were the plaintiff's and that the defendant took them. The effect of the decision is, that the fish were not the plaintiff's, but that the defendant prevented him from taking them. The damage to the plaintiff is the same in either case, and he should, therefore, be placed in such a position as to be able to commence afresh instead of being compelled to try on the old record.

Seemle, the Court will not allow an action to be discontinued after a general verdict.

In Michaelmas Term, 1844, (*a*) *Crowder* and *Butt* shewed cause. As to the last branch of the application,

(*a*) Thursday, Nov. 21, before Lord Denman C.J., *Williams*, *Coleridge* and *Wightman* Js.

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"after a general verdict there can be no leave given to discontinue, for that would be having as many new trials as the plaintiff pleases, but after a special verdict there may, because that is not complete and final; but in that case it is great favour:" *Price v. Parker* (a), *Roe d. Gray v. Gray* (b), and *Goodenough v. Butler* (c). As to the whole application, the plaintiff is too late, having allowed a whole term to pass without any step taken.

*M. Smith* contra. *Goodenough v. Butler* (c) only decided that the plaintiff could not discontinue by a side bar rule. In *Sweeting v. Halse* (d), where the verdict was general for the defendant, the plaintiff, having himself obtained a rule for a new trial, was allowed to discontinue on payment of costs.

Lord DENMAN C. J.—The principle on which a discontinuance is allowed after a special verdict, and not after a general, is plain; in the former case there remains something to be done by the Court; a special verdict is no verdict, until the Court has dealt with it. But here, I think, in addition, that the delay in making this application has not been satisfactorily accounted for.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

Rule discharged.

(a) 1 Salk. 178.

(b) 2 W. Bl. 815.

(c) 2 C. M. & R. 240.

(d) 9 B. & C. 369; S. C. 4 M. & R. 287.



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**EJECTMENT** for lands in Worcestershire. On the trial of the cause before *Wightman J.*, at the Worcestershire Spring Assizes, 1843, it appeared that the lessor of the plaintiff claimed as heir to his father, who died in possession in November, 1816. From the time of his death his widow continued in possession as tenant at will to the lessor of the plaintiff, until her death in July, 1832. Upon the death of the widow the defendant, having no title himself, took possession adversely to the plaintiff, and so continued it until this ejectment was brought (*a*).

The learned judge thought that the lessor of the plaintiff's right of entry was not to be "deemed to have first accrued" under stat. 3 & 4 *Will. 4, c. 27, s. 7*, until the death of the widow in 1832, and therefore that his right was not barred by the above statute. Verdict for the plaintiff, with leave to the defendant to move to enter a verdict for the defendant or a nonsuit.

*R. V. Richards*, in the following Easter Term, obtained a rule nisi accordingly, or for a new trial.

*Godson and Gray* shewed cause (*b*). The statute did not bar the plaintiff, for it is not retrospective. By section 2 he had twenty years to bring his action from the time when his right of entry first accrued. When did his right first accrue? In 1832, on the determination of the tenancy at will by the death of his mother. The case is to be determined by reference to the 2nd section alone. It will be said that his right is qualified by the 7th section, which enacts, "That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or

Stat. 3 & 4 *Will. 4, c. 27, s. 7*, which enacts "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, and of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have first determined," does not apply where the tenancy at will was determined before the passing of the act.

(*a*) The cause had been previously tried in 1841.

(*b*) In last Mich. Vac. (Dec. 9), before Lord Denman C. J., *Williams and Wightman Js.*



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of the person through whom he claims, to make any entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee." The defendant may rely on *Doe d. Bennett v. Turner* (a), where the ejectment was held to be too late. But in that case there was a tenancy at will subsisting at the time the statute passed. In *Doe d. Stanway v. Rock* (b) the tenancy at will had expired more than twenty years before ejectment brought.

*R. V. Richards* and *J. W. Smith* contrâ. The language of *Parke B.*, in delivering the judgment of the Court in *Doe d. Bennett v. Turner* (a) seems decisive in favour of the defendant. There, one tenancy at will began in 1817, and was determined in 1827, when a second tenancy at will commenced: the ejectment was brought in 1839. On this state of facts it is observed in the judgment, "If indeed the tenancy throughout the whole period had been one continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as a tenant by sufferance, then the reasoning of the defendant" (viz. that the right of action first accrued, according to the 7th section, in 1818, being one year after the commencement of the tenancy) "would be correct. In either of those cases the right to bring an action, which by the express provision of the the 7th section undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and, not having been

(a) 7 M. & W. 226; S. C. in error, 9 M. & W. 643. (b) 4 M. & Gr. 30.

exercised during that period, would have been barred. But the facts of the present case, if the finding of the jury be taken to be correct, exclude both hypotheses, on one or other of which the defendant's argument must rest. There was not a continued tenancy at will, for the will was determined in 1827. There was not a tenancy by sufferance, for the jury have found that the defendant was all along tenant at will. The finding of the jury necessarily supposes that after the determination of the will in 1827 a new tenancy at will was constituted. The effect of this was to destroy the right of action which had accrued in 1818, for it is clear that, after creating a new tenancy at will, the lessor of the plaintiff could bring no action until that new tenancy was determined." In that case, it is true, the original tenancy at will was succeeded by a second tenancy at will, here the tenancy at will was succeeded by an adverse possession. But that difference is immaterial to the present question. In that case the Court ordered a new trial, in order that it might be left to the jury to say whether a new tenancy at will was created after the determination of the old one in 1827. From this it is clear that the Court of Exchequer thought the 7th section retrospective. Here, if the tenancy at will, which ended in 1832, can be joined to the subsequent adverse possession, the plaintiff is too late. The period of twenty years is to run from the determination of the tenancy at will, if it end before the year from its commencement, or if not, from the end of the year since its commencement. The words of the 2nd section are all retrospective. That is the governing section; *James v. Salter*(a); the other sections are merely explanatory of it. Section 15 was applied retrospectively in *Nepean v. Doe d. Knight*(b); section 17 in *Doe d. Corbyn v. Bramston*(c), and in *Doe d. Burgess v. Thompson*(d), the same thing must have been assumed with respect to the 7th section, or

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(a) 3 Bing. N. C. 544.

(c) 3 A. &amp; E. 63; S. C. 4 N. &amp; M. 664.

(b) 2 M. &amp; W. 894.

(d) 5 A. &amp; E. 532; S. C. 1 N. &amp; P. 215.

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it would not have been necessary to call in aid the 15th section.

*Cur. adv. vult.*

Lord DENMAN C. J., after stating the facts of the case, now delivered the judgment of the Court as follows:—The question is, whether the plaintiff's remedy is barred by the 7th section of the 3 & 4 *Will.* 4, c. 27.

The tenant at will died one year before the passing of that act, and, if the act had *not* been passed, the lessor of the plaintiff would have been in time with his ejectment, as the period of his adverse possession, or rather when his right accrued, would have been calculated from the death of the tenant at will, in July, 1832, when the tenancy determined.

But it was said that by the 7th section of the statute, the right, where there is a tenancy at will, is to be deemed to have accrued either at the determination of the tenancy, or at the expiration of a year next after the commencement of the tenancy.

It may be, that the effect of this section is to give a right of entry at the determination of the tenancy at will, at any time within a year after its commencement, but at all events at the expiration of a year from its commencement, and consequently, if that section be applicable to the present case, the lessor of the plaintiff is too late, as the tenancy at will of the mother commenced in 1816, and the right of the lessor of the plaintiff would accrue in 1817, more than twenty years before the ejectment was brought.

But we are of opinion that the 7th section only applies to cases of tenancies at will existing at the time the act passed or subsequently, and that it does not apply to cases where the tenancy at will had been determined before the passing of the act.

The words of the 7th section are, "when any person *shall* be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person

entitled subject thereto shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of the tenancy." This section is in terms only applicable to the case of a future or at most of an existing tenancy at will, and not to the case of a tenancy at will which had been determined, and was not existing when the act passed.

A different construction, even if the words permitted it, would cause the greatest hardship; for a person, who, as the law stood before the passing of the act, was in ample time to bring his ejectment and recover property that undoubtedly was his, would, by the operation of the statute, be suddenly deprived of the means of asserting his right, there being no clause for the postponement of the operation of the statute for such a period as would enable persons, who would be otherwise affected by it, to assert their rights.

We are therefore of opinion that this rule should be discharged.

Rule discharged.

The QUEEN v. The Inhabitants of WESTBURY (a).

ON appeal against an order for the removal of *Rachael Harman* and her female bastard child from the parish of Trowbridge, in the county of Wilts, to the parish of Westbury, in the same county, the sessions confirmed the order, subject to the opinion of this Court.

The case set out the notice of chargeability, which was signed as follows: "*George Mundy, Robert Walker, James Brewer*, overseers of the parish of Trowbridge, in the county of Wilts."

The sixth ground of appeal was, "That no legal or sufficient notice has been given by the said respondents to the

Under stat. 4 & 5 Will. 4, c. 76, s. 79, where notice of chargeability is given on behalf of churchwardens and overseers, the act must be authorised by the majority.

*Quere*, whether this must appear on the face of the notice.

(a) Decided during the term (Jan. 24).

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said appellants, that the said pauper and her child were, at the time of making such order, actually chargeable to the parish of Trowbridge."

Upon the hearing of the appeal the respondents proved that the said notice of chargeability was duly served, and also that the three persons by whom it was signed were overseers of the respondent parish. It further appeared, however, that the parish had in all four overseers and two churchwardens.

The appellants thereupon objected that the notice was bad, inasmuch as it was not signed by the majority of the parish officers.

The sessions overruled the objection.

If this Court should be of opinion that the notice of chargeability was sufficient, then the order of removal and the order of sessions were to stand confirmed; if otherwise, to be quashed.

*Hodges* in support of the order of sessions. By stat. 4 & 5 Will. 4, c. 76, s. 79, it is required that the notice of chargeability should be in writing, but it is not required that it should be signed at all. *Reg. v. Justices of Cambridge-shire (a)*, therefore, which decided that notice of application for an order of maintenance, under section 73, must be signed by the majority of the aggregate body of churchwardens and overseers, is not in point, for that section requires such notice to be "under the hands of such overseers or guardians." Under the 79th section the notice might be given by an attorney, or any other person authorised to act on behalf of the parish. The giving such a notice is a merely ministerial act. And the authority of the three overseers to give the notice has been admitted, for, by making the insufficiency of the notice a ground of appeal, the appellants have treated the notice as the act of the respondent parish.

(a) 7 A. & E. 480; S. C. 1 P. & D. 249.

The specific objection that the notice is not signed by the majority, is not pointed out in the ground of appeal.

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*Pashley* contra. The giving notice of chargeability is not a mere ministerial act, but it is a most important step, by which the parish, which has obtained an order of removal, shews that it means to act on the order, and not to abandon it.

It is said that the appellant parish has recognised the authority to give the notice by appealing against it; but it is strange to say that the authority is recognised, when the very objection is that there was no authority.

Undoubtedly a majority might bind the whole body of parish officers. [*Patteson* J. That has been decided also with respect to contracts for the providing for the poor: *Rex v. Beeston* (a).] But it should have appeared on the face of this notice that it was the act of the majority, as was held in *Rex v. Austrey* (b), with respect to a parish certificate. [*Coleridge* J. In that case the statute itself required the hands and seals of the parish officers. But in this case you propose to introduce a requisite which the statute does not. The enactment now in question does not require either hands or seals. Suppose a notice to be signed and delivered by the attorney of the parish officers, with their sanction, would not that suffice?] Even if that be so, this notice is defective, for the case does not find that the three who gave the notice were authorised to act for the whole body. (He was then stopped.)

Lord DENMAN C. J.—We are not bound in this case to decide what is the proper form of notice, but it is certainly desirable that the notice should appear on its face to be the act of the majority. Here, in point of fact, only three of the parish officers acted, and they had no authority to represent the majority.

(a) 3 T. R. 592.

(b) 6 Mau. & S. 319.

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The objection is sufficiently pointed out in the ground of appeal, and ought to have prevailed.

PATTESON J.—The notice of chargeability must be the act of the majority. In what manner it should be shewn to be so may be matter of doubt, but here it is not shewn at all.

COLERIDGE J.—I quite agree in the observations of my Lord and my brother *Patteson*. I desire that we may not be understood to encourage any form which does not shew on the face of the notice that it is the act of the majority. Here, there were six parish officers. If three only could give notice of chargeability, then there might be a notice of abandonment given by the three others, and in that case, which of the two notices would be effectual? It is far better that the notice should appear on the face of it to be the act of the majority.

WIGHTMAN J.—I am of the same opinion. In the case of guardians, the 79th section seems to provide that three may give the notice, without reference to their being a majority of their body or otherwise. But in the case of overseers, the notice must be the act of all or a majority.

Order of Sessions quashed.

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CARPUE v. The LONDON AND BRIGHTON RAILWAY  
COMPANY.

Friday,  
February 9th.

By the London and Brighton Railway Com-  
pany's Act (7

*Will.* 4 & 1 *Vict.* c. cxix.), the company were empowered to make and maintain a railway; all persons were to have liberty to use the same, with carriages properly constructed, upon payment of tolls; and the company were empowered to provide locomotive engines and carriages for the conveyance of goods and passengers.

It was also enacted that no action should be brought against any person for any thing done or omitted to be done in pursuance of the act without twenty days' notice.

*Held*, that the company were not entitled to notice, where an action was brought against them for negligence in carrying a passenger, as they were sued merely as carriers, and not for any thing done or omitted under the act.

and proprietors of a certain railway, to wit, The London and Brighton Railway, and of certain carriages used by them for the carriage and conveyance of passengers, cattle, goods and chattels, in upon and along the said railway, and certain other railways, to wit, The London and Greenwich Railway, and The London and Croydon Railway, from a certain place, to wit, London, to a certain other place, to wit, Brighton, and from Brighton aforesaid, to London aforesaid, for hire and reward to them, the company, in that behalf; and the company being owners and proprietors of the first mentioned railway and the said carriages for the purpose aforesaid, the plaintiff heretofore and before the committing, &c., and before the commencement of this suit, to wit, on the 2nd October, 1841, at the request of the company, became and was a passenger in one of their said carriages, to be by them safely and securely carried and conveyed thereby on a certain journey, to wit, from London aforesaid to Brighton aforesaid, for certain reasonable reward to the company in that behalf, and the company then received the plaintiff as such passenger as aforesaid: and thereupon it became and was the duty of the company to use due and proper care and skill in and about the carrying and conveying the plaintiff on the said journey: yet the company, not regarding their duty in that behalf, did not use due and proper care and skill in and about carrying and conveying plaintiff on his said journey, but took so little care, and so negligently and unskilfully conducted themselves in and about carrying and conveying plaintiff on his said journey, and in conducting, managing and directing the carriage in which plaintiff was such passenger as aforesaid, and the train to which the same was attached, and the engines whereby the said train was drawn upon and along the company's said railway, that, by reason of such want of care and skill of the company, the carriage which contained the plaintiff was then thrown and cast with great violence from and off the rails of the last mentioned railway, and was then over-

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turned, crushed and broken to pieces, and thereby plaintiff was thrown out of the said carriage with great violence, and was grievously bruised, wounded and injured; and also by means of the premises plaintiff became and was sick, &c.

Plea, not guilty.

Issue thereon.

On the trial before Lord *Denman* C. J., at the *Middlesex* Sittings after Michaelmas Term, 1842, it appeared that the plaintiff was a passenger from London to Brighton, by the London and Brighton Railway, in one of the company's carriages, and that he was injured by the carriage having been thrown off the rails near Hayward's Heath, a part of the railway belonging to the defendants. Evidence was given to shew that the rails in the place where the accident happened were out of order just before the accident, and that with reference to their then state of repair the train was going at too great speed. No notice of action had been given to the defendants, to which it was contended that they were entitled under their act (stat. 7 *Will.* 4 & 1 *Vict.* c. cxix, s. 253 (a), local, personal and public). His Lordship gave the defendants leave to move for a nonsuit

(a) Section 194 gives power to all persons to use the railway with carriages properly constructed, upon payment of tolls.

Sections 197 and 198 enacts, that the company may provide and use locomotive engines for the conveyance of passengers and goods, and make reasonable charges for such conveyance.

Section 253 enacts, "That no action, suit or information, nor any other proceeding of what nature soever, shall be brought, commenced or prosecuted, against any person or corporation, for anything done or omitted to be done in pursuance of this act, or in the

execution of the powers or authorities, or any of the orders made, given or directed, in, by or under this act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information or other proceeding, to the intended defendant, nor unless such action, suit, information or other proceeding, shall be brought or commenced within six calendar months after the act committed, &c., nor unless such action, &c., shall be laid and brought in the county or place where the matter in dispute, or cause of action, shall arise."

on this objection. In directing the jury, his Lordship said, that, as the defendants had the railway and machinery exclusively under their own management, it might be presumed that the accident arose from their negligence, unless they could shew that it arose from some other cause, and that the plaintiff, who had not the same means of information, could not be expected to account for the accident.

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Sir *W. W. Follett* S. G. in the Hilary Term following, obtained a rule nisi to enter a nonsuit on the objection above stated, and also on the ground that it was a misdirection to tell the jury that it lay upon the defendants to disprove negligence (a).

Sir *F. Pollock*, *Hayes* and *Attree* shewed cause (b). The cause of action is, that the company have been guilty of negligence in their capacity of carriers. They are not therefore sued in respect of anything "done or omitted to be done in pursuance of the act," and are not entitled to notice of action. The parliamentary powers are exercised by them in their capacity of proprietors, in making and continuing the railway; but in their capacity of carriers they merely do an act which any other persons may do on payment of toll. The circumstance that it might be inconvenient to other persons to exercise the business of carriers along the railway on payment of toll cannot affect the question. Over that part of the railway which belongs to the London and Greenwich and the London and Croydon Companies, the defendants are carriers and nothing else. It might as well be contended, if a coach proprietor were sued for the consequences of negligent driving over a turnpike road which was out of repair, that he could insist

(a) In the course of the argument on shewing cause against the rule, the counsel for the defendants stated that they wished for the judgment of the court upon the

point of notice only.

(b) During Hilary Term last, (January 12 and 13), before Lord Denman C. J., *Patterson*, *Coleridge* and *Wightman* Js.

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upon the same notice of action to which the trustees of the road would be entitled if they had been sued for the non-repair. By stat. 6 Geo. 4, c. 16, s. 44, "every action brought against any person for anything done in pursuance of this act, shall be commenced within three calendar months after the fact committed:" yet in *Carruthers v. Payne* (a), where the assignee of a bankrupt had seized certain property, as being in the order and disposition of the bankrupt, it was held that the section did not apply, so as to render it necessary that an action of trover against the assignee should be brought three months after the seizure. That decision was followed by this Court in *Edge v. Parker* (b) and *Worth v. Budd* (c). In *Fletcher v. Greenwell* (d), where a local act provided, that the directors and guardians of the poor of a parish were to sue and be sued in the name of their clerk, and to have notice of action, it was held that the provision did not apply to an action of assumpsit for work done by their order. But *Palmer v. The Grand Junction Railway Company* (e) is precisely like the present case. There the company's act contained the same provisions with the act now under consideration, and an action on the case was brought against the Grand Junction Railway Company for not safely carrying some horses on their railway, and it was held that they were sued as mere carriers, and therefore were not entitled to notice of action as "for a thing done or omitted to be done in pursuance of the act."

Sir W. W. Follett S. G., *Thesiger* and *Swann* contra. The defendants are not sued as carriers merely, but as proprietors and carriers, and the case shewed a default in both capacities, for it appeared that the bad condition of the rails contributed to the accident. The reasoning in the judgment of Parke B. in *Palmer v. The Grand Junction*

(a) 5 Bing. 270.

(d) 5 Tyr. 316.

(b) 8 B. & C. 607.

(e) 4 M. & W. 749.

(c) 2 B. & Ad. 172.

*Railway Company (a)*, is strongly in favour of the defendants. The learned judge there observes, "If the action was brought against the railway company for the omission of some duty imposed upon them by the act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it," "that case would have fallen within the 214th section" (the section requiring notice of action.) In this case it was imputed to the company that they had neglected to keep the rails in proper order, a neglect analogous to that of not duly fencing the railway.

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*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows :—The only question remaining for our decision is, whether the defendants were entitled to a notice of action under section 253 of their act. For the necessity of such notice it was argued, that the declaration charged an injury done to the plaintiff by the company's omission to perform some of the works required by the act, and the dictum of *Parke B.* was cited in *Palmer v. The Grand Junction Railway Company (a)*. The notice was not thought in that case to be necessary, but the dictum asserts that if an action were "founded on a neglect in not duly fencing the railway, on account of which the travelling was dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general provisions of the act, that case *would have* fallen within the 214th section. But, when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers," for which the learned judge comments on the facts proved in that case.

In deference to that dictum leave was given at the trial to move for a nonsuit, and a rule to that effect was granted.

(a) 4 M. & W. 749.

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It was largely discussed before us; but we are not now called on to consider how far the law laid down in that dictum is correct, because we think it clear in this case, as the learned baron did in that, that the injury has arisen from the defendants' misconduct as carriers, and not as proprietors; though in considering the evidence, it is impossible to exclude some reference to the actual state of the railway.

Hence we think that there is no foundation for any argument in favour of the necessity of a notice; and that the plaintiff is intitled to retain his verdict.

Rule discharged.

WILLIAM HILTON v. The Right Honourable GRANVILLE,  
EARL GRANVILLE.

Saturday,  
Feb. 10th.

In an action on the case for working mines under ground near to the plaintiff's house, so that the house was injured and in danger of falling for want of proper support, the defendant claimed, as lessee of the manor in which the house was situate, and of the mines therein, a prescriptive right to work the mines under any houses, parcel of the manor, paying to the occupiers of the surface a reasonable compensation for the use of the surface, but without making compensation on any other account, and justified under that right.

**CASE.** The declaration stated that plaintiff, before and at the time when, &c., was and thence hitherto hath been and is lawfully possessed of a certain messuage or dwelling-house, with the appurtenances, situate in the manor of Newcastle-under-Lyme, in the county of Stafford, belonging to and supporting which said messuage or dwelling-house, before and at the times aforesaid, there were certain foundations which plaintiff of right had enjoyed and was at the times aforesaid enjoying, and still ought to enjoy, for the support of the said messuage or dwelling-house, without hindrance or disturbance.

That before and at the time when, &c., a certain other messuage or dwelling-house, with the appurtenances, situate in the manor and county aforesaid, was in the possession and occupation of a certain person, to wit, one *John Hilton*, as tenant thereof to plaintiff, the reversion thereof then and

as tenant thereof to plaintiff, the reversion thereof then and

*Held*, 1. That such a prescription was bad as being unreasonable.

2. That such a right could not exist by custom.

3. That the right, if maintainable at all, might have been claimed under either a prescription or custom.

still belonging to plaintiff, and belonging to and supporting which last-mentioned messuage or dwelling-house, before and at the times aforesaid, there were also certain foundations, which plaintiff for himself and his tenants of the same messuage or dwelling-house of right had enjoyed, &c. (as before).

Yet defendant, well knowing the premises, but contriving, &c. to injure, &c. the plaintiff, and to undermine the foundations of his said messuages or dwelling-houses, with the appurtenances, and wholly to destroy the same, while plaintiff was so possessed of the said first-mentioned messuage or dwelling-house, with the appurtenances as aforesaid, and while the said other messuage, &c. with the appurtenances were so in the possession and occupation of the said tenant as such tenant thereof to plaintiff as aforesaid, and while plaintiff was so interested as aforesaid, to wit, on, &c. and on divers days and times between that day and the commencement of this suit, without the leave or licence of plaintiff, so wrongfully, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines under ground near to the said several messuages, &c. with the appurtenances, and got, dug for and moved the ores, minerals and other produce of the said mines and substrata there, near to the said several messuages, &c. with the appurtenances; that by reason of the premises the said respective foundations of the said several messuages, &c. with the appurtenances, then became and were greatly weakened, injured and damaged, undermined and rendered unsafe and unstable and incapable of supporting the said messuages, &c. with the appurtenances, as they would otherwise have done, insomuch that by reason thereof the said several messuages, &c. with the appurtenances, cracked, sank in and are in danger of falling down and being wholly destroyed; by means of all which premises the said several messuages, &c. with the appurtenances, are become and are of much less value to plaintiff than the same were and otherwise would have

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been, and the plaintiff hath been and is greatly prejudiced, &c. in his reversionary estate and interest of and in the said messuage, &c. with the appurtenances, so in the possession and occupation of the said *John Hilton*, as tenant thereof as aforesaid.

Plea 3. As to the alleged grievances, so far as they relate to or have been occasioned by the defendant having, without leaving proper and sufficient support in that behalf, worked the said mines under ground near to the said several messuages, &c., and having dug for, got and moved the ores, minerals and other produce, &c., there, near to the said messuages, &c. That the said messuages, &c. with the appurtenances, in the declaration mentioned, always have been and are situate in the townships of Shulton, otherwise Shelton, and Hanley, otherwise Handley, in the county aforesaid, and at the said several times when, &c., in the declaration mentioned, and from time whereof, &c. and thence hitherto, have been and still are within and part and parcel of the said manor or lordship of Newcastle-under-Lyme, in the county of Stafford; and that the said townships, during all the time aforesaid, have been and still are within the said manor or lordship. And that before the said several times when, &c., and also before and at the time of the making of the indenture in this plea after mentioned, to wit, on 12th October, A.D. 1839, our Sovereign Lady Queen *Victoria* was seised in demesne as of fee, in right of her said Majesty's duchy of Lancaster, of and in the said manor or lordship of Newcastle-under-Lyme, and of and in the collieries, mines, seams and veins of coals, and veins or beds of ironstone and other ores and minerals, situate, lying and being within the said manor or lordship; and that her said Majesty, and all those whose estate she then had of and in the said manor or lordship, and of and in the said collieries, mines, &c. for the time being, and her and their tenants and farmers, occupiers of the said collieries, mines, &c., and all those persons respectively to whom from time to time her said Majesty, or those whose

estates she had as aforesaid, have granted licence and liberty to work, search for, win, get and bring up the said collieries, mines, &c. from time whereof, &c. have been used and accustomed of right, and of right ought to have been used and accustomed, and they still of right ought to be used and accustomed, to get, win and work the said collieries, mines, &c. under any messuages or dwelling-houses, buildings and lands, part or parcel of the said manor or lordship, and within the townships aforesaid, or either of them; and then and there for the purpose of getting, winning and working the said collieries, mines, &c., to dig and make under ground all such mines, pits, shafts, holes and levels, under the said messuages or dwelling-houses, buildings and lands, or any part thereof, as might from time to time be expedient and necessary for that purpose, and out of the said mines, pits, shafts, holes and levels, so dug and made as aforesaid, to raise, dig, get and move the coals, ironstone, ores and other minerals there found, and the same when so raised, dug, got and moved from and out of the said mines, pits, &c., to carry away and convert to her and their own use, doing no more than necessary for the purpose aforesaid, and making and paying to the respective tenants and occupiers of the surface of any lands damaged thereby a reasonable compensation and satisfaction when demanded, for and in respect of the *user of the surface* of such lands in and about the getting, winning and working of the said collieries, mines, &c., and for and in respect of any damage from time to time occasioned or to be occasioned to the surface of the said lands by any thing done upon the said surface in and about the getting, winning and working the said collieries, mines, &c., but without making any compensation or satisfaction for or in respect of the said surface *on any other account*, and without making compensation or satisfaction for any damage occasioned or to be occasioned to any messuages, dwelling-houses or other buildings, within and part and parcel of the said manor or lordship, by or for

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the purpose of the getting, winning and working the said collieries, mines, &c.

That her Majesty, being so seised, before the times when, &c., to wit, on 12th October, 1839, by indenture, sealed with her seal of her said duchy of Lancaster, and made between herself of the one part and defendant of the other part, and in due manner inrolled of record in the office of the auditor of the said duchy of Lancaster at Westminster, did grant and demise to defendant, his executors, administrators and assigns, all those collieries or mines, &c. of coal, called, &c., situate within the said several liberties, townships or villages of Shulton, &c. and Hanley, &c., within the said manor or lordship of Newcastle-under-Lyme, parcel of the possessions of her Majesty's said duchy in the county of Stafford, and all other mines, &c. of coal belonging to her Majesty within the liberties, &c. aforesaid, with full liberty, &c. to and for defendant, his executors, &c. to dig, search for, discover, win and get the mines, veins and seams of coal within the said liberties, &c., parcel of the said manor, &c., and to take, carry away and convert the same, &c., and for the more effectually draining, getting, winning and working, &c., to dig and sink pits, &c., and to do all other acts which should be necessary and expedient for the several purposes aforesaid, within any part or parts of the said liberties, &c. in as large, ample and beneficial a manner as the said Queen's Majesty, her heirs, &c. might or could have done if that indenture had not been made: habendum to defendant, his executors, &c., from the 29th September next preceding the day of the date of that indenture, for thirty-one years, from thence next, &c. By virtue of which several premises defendant entered and became possessed, &c.

That by virtue of the indenture, after the making of the indenture and during the term, &c., to wit, on, &c., defendant got, won and worked certain mines, &c. in the indenture mentioned and thereby granted, &c., and situate near to the said messuages, &c. of the plaintiff, and within the

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liberties, &c. aforesaid, and then, for the purpose of getting, winning and working the said mines, seams and veins of coal, &c., dug and made under ground certain mines, pits, shafts, holes and levels under certain lands, being part and parcel of the said manor or lordship, and situate within the said townships and near to the said messuages or dwelling-houses of the plaintiff, with the appurtenances; the same mines, pits, &c. being expedient and necessary for that purpose, and then dug, got and moved from out of the said mines, pits, &c. certain large quantities of coal, &c. by the said indenture also granted, which said digging and making, &c., and digging, getting and moving, &c., is the working of mines and digging, &c. without leaving proper or sufficient support, &c. in the declaration mentioned. Whereby and by means and reason of the premises in this plea aforesaid, the respective foundations of the said several messuages, &c. of the plaintiff unavoidably became and were a little weakened, &c., undermined, &c., defendant on the said occasions doing no more than was necessary for the several purposes aforesaid, and doing no unnecessary damage to plaintiff. Verification.

Replication: as to so much (a) of the third plea as relates to the messuage secondly mentioned, that before the committing, &c. and before the making of said indenture, to wit, 15th July, 1807, our late Sovereign Lord King *George the Third* was seised in fee of the duchy of Lancaster, and in right thereof of the said manor of Newcastle-under-Lyme, and mines and minerals, &c., that from time whereof, &c. the tenements after mentioned were and still are within and parcel and customary tenements of the manor, and demisable by copy of court roll in fee at the will of the lord, according to the custom of the manor. That before the committing, &c., and before the making of the indenture in the third plea mentioned, to wit, at a special court baron, held on, &c., *George the Third*, being so seised, &c.,

(a) The replication as to the other part of the third plea led to an issue in fact.

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granted the messuage, &c. with the appurtenances, &c. to plaintiff in fee, to hold at the will, &c., according to the custom of the manor, by the rents and services thereof due and of right accustomed. By virtue of which grant plaintiff, before the making, &c., entered and was seised, &c., and so continued until the time when, &c. That before and at the time of the grant the said messuage was supported by the said foundations, and had no others, and they were part and parcel of the manor, and were necessary to the support of the said messuage, &c., so that without the same it could not stand or be used, &c., and they continued so necessary, &c. until and at the times when, &c., and by reason thereof plaintiff and his tenants, &c., during all the times, &c. had enjoyed and of right ought, &c., as in the declaration mentioned.

That *John Hilton* entered as tenant to plaintiff after the grant; that the manor, &c. descended from *George* the Third to the Queen as heiress of *William* the Fourth; and that defendant, claiming by colour of a certain surrender, pretended to have been made by plaintiff, whereas nothing ever passed thereby, committed the grievances, &c. Verification.

Rejoinder: as to the prescription, similiter.

As to the replication with respect to the second messuage, special demurrer and joinder therein.

Plea 4: a justification under an immemorial custom within the manor, in the terms of the third plea, mutatis mutandis. Verification.

Replication: the same with respect to the second messuage (a) as the replication to the third plea, mutatis mutandis.

Rejoinder: as to the custom, similiter.

As to the replication with respect to the second messuage, that, according to the custom of the manor, the tenements in the replication mentioned to have been granted to plaintiff have been immemorially demised and

(a) The other part of the replication to the fourth plea led to an issue of fact,

demisable by copy of court roll, subject to the custom in the fourth plea mentioned, and that the last mentioned messuage, &c. was granted to plaintiff by *George the Third*, subject to the said custom. Verification.

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Special demurrer and joinder therein.

There being a demurrer on each side, each party claimed the right to begin. *Erle* on this point cited *The Earl of Falmouth v. Thomas* (a).

Lord DENMAN C. J.—The practice is understood to be, that the party who first demurs is entitled to begin.

*Erle* for the defendant (b). The replications are bad and the pleas good. (As the judgment is confined to the validity of the pleas, the argument on the replications is omitted.) The third and fourth pleas in substance set up a claim, by the owner of the minerals against the owner of the surface, to have the right of doing all that may be necessary to get the minerals, and, as far as underground operations are concerned, without compensation. The owner of a house is not entitled to have it supported by the adjoining land of another person, unless the house be an ancient house, so as to raise the presumption of a grant against the adjoining landowner: *Partridge v. Scott* (c), *Wyatt v. Harrison* (d). Suppose the surface in this case to have been parted with, subject to the right of mining, the owner of the house could not have the right claimed. The introductory part of the pleas limits the justification to the bare fact of leaving the houses without support, so as to throw aside and exclude any charge of negligent or improper mining. *Dodd v. Holme* (e) and *Harris v. Ryding* (f), therefore, do not apply. Suppose the owner of two adjacent houses is in the habit of carrying on a nuisance

(a) 1 C. & M. 89.

(b) The case was argued on a former day in this vacation (Feb. 5), before Lord Denman C.J., *Patteson, Coleridge and Wightman* Js.

(c) 3 M. & W. 320.

(d) 3 B. & Ad. 871.

(e) 1 A. & E. 403; S. C. 3 N. & M. 739.

(f) 5 M. & W. 60.

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in one of them, and sells the other house with notice of the nuisance : could the purchaser sue him ? Here it may be taken that the surface and the minerals formerly belonged to the same person. In mineral districts, the surface is commonly of little value. Is it improbable or unreasonable that the owner, when parting with the surface, should stipulate that the grantee should hold it subject to all the grantor's rights of mining ?

The right claimed is sufficiently certain, and is not bad as involving a claim to destroy the subject-matter of the supposed grant. If the surface fall it will be still surface. If a person claiming a toll for passing over a highway can shew that the toll and soil, though now severed, were once in the same hands, it may be presumed that the soil was granted to the public in consideration of the tolls, for "the rule with regard to prescriptions is, that every prescription is good if by any possibility it can be supposed to have had a legal commencement:" *Lord Pelham v. Pickersgill* (a). In *Bourne v. Taylor* (b) it was held that the lord of a manor has no right, without a custom, to enter upon the copyholds within his manor to bore for mines, but it was not disputed that by custom or reservation he might do so. In *Paddock v. Forrester* (c) the same right of mining in this very manor was pleaded, and its validity in point of law was not disputed. *The Earl of Cardigan v. Armitage* (d) is an instance of a similar right.

As to the fourth plea, which relies upon a custom, it is enough to shew that such a custom may have had a reasonable origin. Such a custom then may well rest on agreement. In *Tyson v. Smith* (e), the custom there considered is so put. "The custom," says *Tindal C. J.*, "arrives at last to an agreement, which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing

(a) 1 T. R. 660, 667.

(b) 10 East, 189.

(c) 3 M. & Gr. 908.

(d) 2 B. & C. 197 ; S. C. 3 D. & R. 414.

(e) 9 A. & E. 425 ; S. C. in Q. B., 6 A. & E. 745.

down to our own times, that it has become the law of the particular place." In *Bateson v. Green* (a) it was held, that the right of commoners may be subservient to the right of the lord in the soil, so that the lord may dig clay pits without leaving sufficient herbage for the commoners. *Buller J.* in his judgment observed, "Where there are two distinct rights claimed by different parties, which encroach on each other in the enjoyment of them, the question is, which of the two rights is subservient to the other? It may be either the lord's right which is subservient to the commoners, or the commoners' which is subservient to the lord's. In general one would say that the lord's is the superior right, because the property of the soil is in him; but, if the custom established by evidence shew that it is subservient to the commoners, then he cannot use the common beyond that extent, otherwise he subjects himself to an action for the excess. But here the evidence shews that the commoners' right to the enjoyment of the common has always been subservient to the lord's, for he has always dug the common when, where and in what manner he pleased." In *Clarkson v. Woodhouse* (b) the lord alleged a custom for the tenants to have portions of the waste assigned to them for getting turves, and for the lord, after such portions had been cleared of the turves, to have the ground free from common. The custom was objected to as unreasonable, because in destruction of the right claimed by the tenants. But it was answered by Lord *Mansfield C. J.*, "This is a qualification of the right; suppose it introduced at the same time with the grant, the grantor might qualify it in any way. It is not an unreasonable matter of agreement or grant, therefore there is nothing unreasonable or repugnant in this." In *Folkard v. Hemmett* (c), *De Grey C. J.* appears to have suggested that the lord might reserve the right of granting part of the common to strangers for building. In *Place v. Jackson* (d) the right of common was

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(a) 5 T. R. 411.

(c) 5 T. R. 417, n.

(b) 5 T. R. 412, n.

(d) 4 D. &amp; R. 318.

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held to be subservient to the lord's right of digging stone. In *Broadbent v. Wilks* (a), a custom for the lord when working coal pits to throw the earth near to the pits and leave it there was held bad for uncertainty. Yet it was said by *Willes* C. J., in delivering the judgment of the Court, "The objection that this custom is only beneficial to the lord and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on account of this disadvantage to his tenant." In *Arlett v. Ellis* (b) it was held, that a custom for the lord of a manor to inclose the waste without limit was bad, as being inconsistent with the rights of the commoners. In that case undoubtedly the exercise of an unlimited right of building would destroy the common altogether. Here the surface will not be destroyed by the right claimed. They also referred on this point to the custom of bounding (considered in *Doe d. Earl of Falmouth v. Alderson* (c), *The Case of Mines* (d), *Hix v. Gardiner* (e), *Mille v. Benet* (f), *Gilb. Ten.* 305, 5th ed.).

If it be objected that the lease stated in the pleas is void, as not having been made in conformity with stat. 1 Ann. c. 7, s. 5, the defect, if any, is cured by pleading over: *Bishop of London v. Mercers' Company* (g), *Fletcher v. Pogson* (h). At all events the lease would be valid during the life of the Queen.

*Kelly* contra. The defendant claims a right to mine under dwelling-houses, which are admitted to be immemorial, without leaving them necessary support; and this without notice and without compensation. Such a right is very different from the right to undermine arable or pasture

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|-----------------------------------------------------------------------------|-----------------------------------------------|
| (a) <i>Willes</i> , 360.                                                    | (e) 2 <i>Bulst.</i> 195.                      |
| (b) 7 B. & C. 346; S. C. 9 D. & R. 897.                                     | (f) <i>Yearb. Trin.</i> 2 H. 4. 24 B. pl. 20. |
| (c) Note to the report of <i>Vice v. Thomas</i> , by <i>Smirke</i> , p. 39. | (g) 2 <i>Str.</i> 925, 931.                   |
| (d) <i>Plowd.</i> 310, 336.                                                 | (h) 3 B. & C. 192; S. C. 5 D. & R. 1.         |

land. It is said that unless this right exist it will be impossible to mine under houses. But no such consequence follows; it will merely be necessary for the miner to leave pillars to support the houses.

The right claimed, whether by way of custom or prescription, is void on two grounds: 1. It destroys the subject-matter of the tenure. 2. It tends to a common nuisance. It does not follow the rules of a valid *custom*, as laid down in *Le Case de Tanistry (a)*. It is ridiculous to suppose that the houses in question were built subject to an agreement that the miner might let them down whenever he pleased. *Broadbent v. Wilks (b)* is decisive of the present case; and *Badger v. Ford (c)* and *Arlett v. Ellis (d)* are strong authorities for the plaintiff, for they shew that the lord cannot have the right to destroy even an incident of his grant. Here the whole subject is destroyed. *Harris v. Ryding (e)* shews that the miner is bound to leave support for the surface. If the right claimed could exist, the plea is bad, as it does not allege that the right has been immemorially used.

The right must therefore be claimed by *prescription*. But the lord cannot *prescribe* against his tenant. Whatever right the lord has is by *custom*. [*Coleridge J.* It does not appear on the pleas that the premises are copyhold. *Patteson J.* If the replication is got rid of as argumentative, there will be nothing on the record to shew that the premises are copyhold.] However that may be, the right, whether claimed by prescription or custom, is void. It must be supposed by the defendant that the owner of the dwelling-house granted the right of undermining it. [*Patteson J.* That is not the supposition, but that the owner of the mine made the grant to the owner of the dwelling-house subject to the right of mining.] Then the reservation is bad as being repugnant to the grant. In *Shepp. Touch.*

(a) Davys, 32.

(b) Willes, 360.

[c] 3 B. &amp; Ald. 153.

(d) 7 B. &amp; C. 346; S. C. 9 D. &amp; R. 897.

(e) 5 M. &amp; W. 60.



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p. 79, c. 5, s. 7, it is laid down that an exception is invalid, if it "be such as is repugnant to the grant, and doth utterly subvert it and take away the fruit of it, as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grass of it; or grant a manor excepting the services." See also *Potter v. North*(a), *Vin. Abr.* 265, *Prescription*, (G), pl. 4, and *Dewell v. Sanders*(b) shew this claim to be invalid, as tending to a nuisance.

In the cases cited for the defendant, there was some incident only of the subject-matter destroyed, and not the subject-matter itself. [*Patteson J.* referred to Lord *Lonsdale's* case, cited in *Wyrley Canal Company v. Bradley* (c).] In *Paddock v. Forrester* (d) and *The Earl of Cardigan v. Armitage* (e), no question was raised as to the legality of the prescription. In *Bateson v. Green* (f) the marginal note is not warranted by the judgment, and if the meaning of the case is that the lord may deprive the commoner of his common *altogether*, it is not law, and is certainly not upheld to that extent in *Artlett v. Ellis* (g).

He also contended that the lease stated in the pleas was void under stat. 1 *Ann.*

*Erle* in reply contended that there was no claim by the defendant to commit a common nuisance, as it did not appear that the houses were in a public place; that his claim would certainly be supported by an express grant; and that the claim was not to destroy the dwelling-houses at pleasure, but that the tenant had chosen to take them subject to a contingency, which might never have happened, of the vein of coal taking a certain direction.

*Cur. adv. vult.*

(a) 1 Vent. 383.

(b) Cro. Jac. 490.

(c) 7 East, 368, 371, 372.

(d) 3 M. & Gr. 903.

(e) 2 B. & C. 197; S. C. 3 D. & R. 414.

(f) 5 T. R. 411.

(g) 7 B. & C. 365; S. C. 9 D. & R. 897.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—This is an action on the case for injuring two ancient houses; one occupied by the plaintiff, the other held under him by a tenant. These acts are justified by a prescription, stated in the third plea, and by a custom set out in the fourth, by which a right is claimed for the defendant as lessee of the manor of Newcastle-under-Lyme. (His Lordship here stated the claims of right as alleged in the pleas.)

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These pleas are demurred to, as setting forth a prescription or custom which cannot be sustained at law, because unreasonable. In considering the question, we make no distinction between the two pleas; they are the same with reference to the objection. If either the prescription or the custom is bad on that account, the other must be bad likewise; and, if the one is valid in law, the other may be valid also. We also think that the question, whether these houses are freehold or copyhold, does not affect that which I have just stated. If the custom can so far prevail as to attach on all the freehold houses within the manor, it might also attach on all ancient copyhold houses, such as the defendant has described these two houses.

The principle upon which this custom is said to be invalid, is laid down by *Willes C. J.* in *Broadbent v. Wilks*(a). The paragraph was cited by both parties in the argument. "The objection, that this custom is only beneficial to the lord, and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on account of this disadvantage to his tenant. But the true objections to this custom are, that it is uncertain and likewise unreasonable, *as it may deprive the tenant of the whole benefit of the land, and it cannot be presumed that the tenant at first would come into such an agreement.*"

The custom thus held invalid was this, that "when and as often as the lord of the manor or his tenants of the col-

(a) *Willes*, 360.

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lieries or coal mines," "have sunk pits in the freehold lands in Halton," "for the working of the said collieries there, to get coals coming and arising from thence," the lord and his tenants "have used and been accustomed to throw, cast and place" "the earth, clay, stones," &c. "coming therefrom together in heaps on the land near to such pits," "there to remain and continue, and to "place" wood there for the necessary use of the said pits, and to take and carry away from thence with carts" "part of the said coals so laid and placed there, and to burn and make into cinders there other part of the said coals," "at his and their will and pleasure."

Lord Chief Justice *Willes*, after pointing out the uncertainty of the alleged custom, proceeds: "And certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal pits when and as often as they please, and may in such case lay their coals &c. on any part of the tenant's land, if near to such coal pits, at what time of the year they please, and may let them lie there as long as they please; so they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable."

The case was removed by writ of error from the Court of Common Pleas into this Court: after being argued several times, the judgment was unanimously affirmed (*a*). Lord Chief Justice *Lee* said (*b*) that the question was, "whether this was a reasonable *lex loci*, which they held it not to be, inasmuch as it laid a great burden upon the land of the plaintiff, without any consideration appearing, either public or private. That it savoured of an arbitrary power, and might (as laid) put it in the power of the lord totally to deprive the tenant of the benefit of the land, there being no restriction in time, and the word *near* was too

(*a*) *Wilkes v. Broadbent*, 1 Wils. 65; S. C. 2 Str. 1224.      (*b*) 2 Str. 1225.

vague and uncertain." The report in *Wilson*, after mentioning the vagueness of that word, remarks also that the custom is "very unreasonable, for it laid such a great burden upon the tenant's land, without any consideration or advantage to him, as tended to destroy his estate, and defeat him of the whole profits of his land, and savours much of arbitrary power, being pleaded to be at the will and pleasure of the lord, and to do it as often and when he pleases;" "and what was said at the bar touching the public utility of coal pits to the realm cannot be considered, for the pits may be worked without this custom, for ought that appears to the contrary;" "and to support this custom would be to take away the whole benefit of the land granted originally to the copyholder by the lord; and it is a void custom and contrary to law, that the lessor shall have common *encounter son demise quia est part del chose demise*; *Palm. 212(a)*; and this custom, being pleaded to be at the will and pleasure of the lord, tends to make him judge in his own cause, which the law will not endure."

There can be no necessity for shewing by a comparison of details, that the custom now pleaded is far more oppressive than that which was thus deliberately condemned by both Courts. The words "at the will and pleasure of the lord" do not indeed appear in the present record: but such is the effect of the claim; for the lessee of the duchy and his sub-tenants assume the power of entering any lands within the manor, and searching for minerals, without any restriction as to times and seasons, or the mode of occupation or culture. Several cases were cited to shew that such a custom might be valid. The most recent, *Paddock v. Forrester (b)*, though arising in the same district, has no bearing whatever on the point before us. The plaintiff there sued for trespass in digging and taking away his land and the coal ore there. The defendant justified in his third plea, under a custom stated generally, and in his fourth,

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(a) *White v. Sayer*, *Palm.* 211,

(b) 3 M. & G. 903.

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under the same custom as qualified by a right to compensation. The general custom was traversed: under the special custom, the defendant pleaded that he had made sufficient compensation. At a trial at bar in the Court of Common Pleas, the jury found the compensation insufficient, and the Court directed a verdict for the plaintiff on the third plea, holding that it was not supported by proof of the qualified custom. The injury to foundations was in no way connected with that trial.

The greatest reliance, however, was placed on some decisions, in which a custom derogatory to the lord's oral grant has been holden valid. *Bateson v. Green* (a) is the strongest of these cases, where the lord of the manor defended himself successfully against a commoner, whose extent of common he had curtailed by taking clay, on proof that the lord had constantly done so. The language of Lord Kenyon is certainly large, though considered by Bayley J., in *Arlett v. Ellis* (b), to be subject to some restriction. If, indeed, it must be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions in the notes to *Bateson v. Green* (a) are much more cautiously worded; and in that of *Folkard v. Hemmett* (c), Lord Chief Justice De Grey expressed himself conformably to what we consider the true legal principle. "The defendants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord;" and assuredly, whatever the lord can reasonably be supposed to have reserved out of his grant, the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of

(a) 5 T. R. 411.

(c) 5 T. R. 417, note (a) to

(b) 7 B. & C. 346; S. C. 9 D. *Bateson v. Green*.  
 & R. 897.

the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument.

Our speedy decision was requested by both parties, and our opinion being clear ought not to be delayed. If it is wrong, it may be placed immediately in the proper train for correction.

Judgment for plaintiff.

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MOULD v. WILLIAMS and another (a).

TRESPASS for taking and carrying away the plaintiff's timber.

Plea. Not guilty (by statute).


Issue thereon.

On the trial before Lord *Denman* C. J. at the Middlesex Sittings after Michaelmas Term, 1843, it appeared that the defendants were justices of the peace for the county of Middlesex, and that they justified the trespass under the Highway Act, stat. 5 & 6 Will. 4, c. 50, s. 73, which enacts, that "if any timber, stone, &c., shall be laid upon any highway so as to be a nuisance, and shall not after notice given by the surveyor, &c., be forthwith removed, it shall and may be lawful for the surveyor, &c., by order in writing from any one justice, to clear the said highway by removing the said stone, &c." The surveyor of the highways in the parish of Enfield had given the plaintiff notice to remove certain timber alleged to be lying on and obstructing the highway. The timber not having been removed, the same officer summoned the plaintiff to shew cause before the defendants why the timber should not be

Under the Highway Act (stat. 5 & 6 Will. 4, c. 50, s. 73), (which enacts that if any timber, &c. is laid upon any highway so as to be a nuisance, and shall not after notice be removed, it shall be lawful for the surveyor, by order in writing from a justice to remove the timber, &c.) an order of a justice, reciting that the plaintiff's timber was laid on the highway and directing its removal, is conclusive to shew that the locus in quo was a highway, so that

(a) Decided on the last day of the term.


the plaintiff in an action of trespass against the justice who made the order cannot dispute his jurisdiction on the ground that the locus in quo was not a highway.

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removed from the highway. The plaintiff attended the summons. The surveyor gave his information upon oath, and, after a hearing, requested the defendants to issue their warrant for removing the timber from the highway. They issued their warrant reciting these proceedings, and directing the surveyor to remove the timber from the highway. For the surveyor's execution of this warrant, the magistrates were sued as trespassers on the ground that they had no jurisdiction, because the place where the timber was removed was not part of the highway. The warrant was produced. For the plaintiff it was proposed to shew that the place from which the timber had been removed was no part of the highway. His lordship held the order to be conclusive on this point, and rejected the evidence. Verdict for the defendants.

*Bramwell* moved (a) for a new trial, on the ground that the order was not conclusive to shew the locus in quo to be a highway, and that therefore the evidence on this point should have been admitted. In *Bramwell v. Panneck* (b), a person, employed by an attorney to keep possession of goods seized under a fi. fa., made complaint to a magistrate that he could not obtain payment for his services, and the magistrate, having summoned the party and heard the complaint, proceeded under stat. 20 Geo. 2, c. 19, and made an order upon the attorney for payment of a sum of money which was afterwards levied on his goods. It was held the magistrate was liable in trespass, for that the service performed was not of a nature to give jurisdiction under the statute. In that case it might have been said that the nature of the service was a fact which the magistrate had to adjudicate on, and therefore that his judgment was conclusive, yet the Court decided that he was liable on the ground that the complainant was not a labourer within the statute in point of fact. It is true that the warrant set out

(a) On the 13th January, before Lord Denman C. J., *Patteson*, Coleridge and Wightman J.,  
 (b) 7 B. & C. 536; S. C. 1 M. & R. 409.

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the nature of the service, so that it might have been argued that the warrant was bad on the face of it, but the judgment seems to have proceeded entirely on the ground that there was not jurisdiction in fact. [Lord Denman C. J. I thought *Brittain v. Kinnaird* (a) was applicable, as the justices had jurisdiction to decide whether the place was a highway or not.] *Branwell v. Penneck* (b) is the later decision, and, like the present, was a case where an order of magistrates was in question, and not a conviction, as in *Brittain v. Kinnaird* (a). In *Basten v. Carew* (c), which was trespass for giving plaintiff's landlord possession of a farm as a deserted farm, *Holroyd J.* put it, that, when acting under the stat. 11 Geo. 2, c. 19, s. 16, the magistrates were judges of record. The distinction now suggested between an order and a conviction was taken by *Burrough J.* in *Brittain v. Kinnaird* (a), with reference to *Welch v. Nash* (d), and by *Bayley J.* with reference to the same case in *Gray v. Cookson* (e). In *Welch v. Nash* (d), where a new highway had not been set out before the old one had been stopped up, it was held that the legality of the order of the magistrates under the General Highway Act might be questioned, although they were confirmed by sessions on appeal. In *Weaver v. Price* (f) it was held that trespass lay against magistrates for granting a warrant to levy poor rates, if the party distrained upon has no land in the parish. Yet in that case the warrant recited that the plaintiff was an occupier within the parish. In *Rex v. Gilhes* (g), an order of justices, requiring the stewards of a benefit society to readmit a member who had been expelled, recited, that it appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order, it was held that the recital was not

(a) 1 B. &amp; B. 432.

(d) 8 East, 394.

(b) 7 B. &amp; C. 536; S. C. 1 M. &amp; R. 409.


(e) 16 East, 23.

(c) 3 B. &amp; C. 649; S. C. 5 D. &amp; R. 558.

(f) 3 B. &amp; Ad. 409.

(g) 8 B. &amp; C. 439; 2 M. &amp; R. 454.



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evidence of the enrolment of the rules. He cited also *Fernley v. Worthington* (a). A conviction is a judgment; but in a case like the present no judgment could be pleaded, so that the defendants, if they had been compelled to plead specially, would have had to plead the *fact* that the timber was on the highway.

*Cur. adv. vult.*

Lord DENMAN C. J., after stating the facts as above, delivered the judgment of the Court as follows:—It appeared to me on the trial that there was no difference between this case and *Brittain v. Kinnaird* (b), except that there the magistrates convicted, here they issued a warrant to remove an obstruction. It does not appear to us that this can make any difference in principle. In both cases they are bound to exercise the power confided by the act. The party interested receives notice to attend and disprove all that can entitle them to adopt any measures against him, and their warrant is an adjudication of every material point.

We were, however, rather disposed to doubt whether, as the 73rd section gives this authority only where the obstruction is laid *on the highway*, the jurisdiction might not be disproved by shewing to the jury's satisfaction that the locus in quo was not part of the highway. The same might have been said in *Brittain v. Kinnaird* (b). The power of convicting was given by 2 Geo. 3, c. 28, where the owner of a boat used it in the manner prohibited, and the court held that magistrates, committing the plaintiff for having used his *boat* in such manner, were not to be made answerable in trespass by proof submitted to a jury that plaintiff's boat was not such a one as the act described; but that the finding by the magistrates on their conviction was conclusive against him on that point. We think we ought to throw no doubt on the authority of that case.

We were pressed with the case of actions against magis-

(a) 1 M. & Gr. 491.

(b) 1 B. & B. 432.

trates who issue warrants of distress for enforcing payment of poor rates, in which they have been held liable to an action for damages, if the rate itself be invalid. This case is clearly distinguishable. A rate indeed, good on its face, and free from any such defect as makes it wholly void, is a necessary part of the foundation of the jurisdiction; but with the formation of that rate the magistrates have nothing to do, nor does its validity ever come in judgment before them,—that is a mere fact, as to which they institute no inquiry and come to no judicial conclusion; their warrant of distress, therefore, cannot be any evidence, still less conclusive evidence, of any fact on which the validity of the rate may depend, nor in its terms does it affect to be. For example, occupation within the parish for which the rate is made, is necessary to its validity as against the individual, but the inquiring into that would be extra-judicial by the magistrates, and therefore when the party brings that matter before them, in answer to the application for the warrant, this Court has usually declined to compel them by mandamus to issue their warrant, which it never would have done, if the magistrates had the right, for then it would have been their duty to examine into it judicially, and decide on that fact.

The principle, therefore, on which convictions are conclusive evidence of the facts stated is there necessary to their validity, does not apply.

Rule refused.

—◆—  
 LOBB and KNIGHT *v.* STANLEY (*a*).

**ASSUMPSIT** for goods sold and delivered and on an account stated.

Plea, the defendant's bankruptcy, certificate and discharge.

(*a*) Decided during the term (January 30).

s. 131, so as to revive a claim barred by the bankrupt's certificate: "Mr. Stanley begs to inform Messrs. Lobb & Co. that he will take an early opportunity of settling their account, but Mr. Stanley objects to give his bill."

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The following note held to be sufficiently signed, and to contain a sufficient promise under stat. 6 Geo. 4, c. 16,

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Replication, that after the bankruptcy, and before the commencement of this action, to wit, on 4th June, 1842, defendant, in writing signed by him, assented to and then ratified and confirmed the promise in the declaration mentioned, and then promised plaintiffs to pay them the sums of money therein also mentioned.

Rejoinder, traversing the replication. Issue thereon.

The cause was tried before Lord *Denman* C. J., at the London Sittings after last Michaelmas Term. The following letters in the defendant's handwriting were put in evidence for the plaintiffs.

1.

"Mr. *Stanley* cannot comply with the request of Messrs. *Lobb & Co.*, but will discharge their account as soon as he possibly can. Friday."

2.

"Mr. *Stanley* begs to inform Mr. *Lobb* that he will be glad to give him a promissory note or bill for the amount of Mr. *Stanley's* account, payable at three months, as Mr. *Stanley* has of late been put to heavy expenses, and hopes this arrangement will be satisfactory to Messrs. *Lobb*. 3, Crescent, Thursday morning."

3.

"Mr. *Stanley* begs to inform Messrs. *Lobb & Co.*, that he will take an early opportunity of settling their account, but Mr. *Stanley* objects to give his bill, Mr. *Stanley* regrets that he has been prevented from answering Messrs. *Lobb & Co.'s* letter before. Crescent, Saturday."

It appeared that the fiat against the defendant issued in July, 1841. No direct evidence was given of the date when the defendant's letters were received, nor of the order in which they were received. They were read in the order in which they are set out above. The plaintiffs were mercers and drapers in Southampton, and it was proved that the defendant resided in the Crescent, Southampton, from February, 1841, to February, 1842, and that a clerk

of the plaintiffs, by their directions, delivered to the defendant a letter from them addressed to him, at the latter end of September, 1841; the contents of this letter the witness could not speak to. Notice had been given to the defendant to produce all letters sent to him by the plaintiffs between July, 1841, and June, 1842, but no such letters were produced, nor was secondary evidence given of their contents. It was objected that the issue was not proved, as the letters were not signed or dated, and also that they contained no distinct promise to pay the debt. His lordship directed a verdict for the plaintiffs, but gave the defendant leave to move to enter a nonsuit.

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*Whateley* in the present term having obtained a rule nisi accordingly,

*Thesiger* and *Ogle* now shewed cause. The question arises on stat. 6 Geo. 4, c. 16, s. 131, which enacts, "That no bankrupt, after his certificate shall have been allowed, &c., shall be liable to pay or satisfy any debt, claim or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim or demand, upon any contract, promise or agreement, made or to be made after the suing out of the commission, unless such promise, contract or agreement be made in writing signed by the bankrupt, or by some person thereto lawfully authorised by such bankrupt." The Statute of Frauds contains provisions which are in terms so nearly the same, as the section in the bankrupt act, that the decisions under the one act may be cited as decisions under the other. The fourth section of the Statute of Frauds enacts, that no person shall be charged for the default of another, &c. unless the agreement upon which the action shall be brought "shall be in writing and signed by the party to be charged." And again, the bargain under the seventeenth section is to be in writing, "signed by the parties to be charged." In

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*Hubert v. Moreau* (a), which was cited on moving for this rule, the bankrupt did not write his name, but merely the initial letter *M*. *Best* C. J., held that this was not a signature within the act. He was also inclined to think that the date of the writing could not be proved by parol evidence, but he did not decide the point. The point however was decided in *Edmunds v. Downes* (b), under the Statute of Limitations, 9 *Geo.* 4, c. 14, s. 1, which requires that a promise, to take a case out of the statute, must be "made or contained by or in some writing to be signed by the party chargeable thereby." It was there held that the date of the written promise might be supplied by parol evidence. The point was decided also in *Hartley v. Wharton* (c), with respect to the ratification of a contract during infancy, under the 5th section of the same statute, which requires that such ratification "shall be made by some writing signed by the party to be charged therewith." With regard to the signature, "I, *James Crockford*, agree to sell," &c., without the name subscribed, was held sufficient under the fourth section of the Statute of Frauds; *Knight v. Crockford* (d). So under the 5th section, requiring a will to be "signed by the party devising," a will in the handwriting of the deviser, and commencing thus, "I, *John Stanley*, make this my last will and testament," was held to be sufficiently signed: *Lemayne v. Stanley* (e). In *Saunderson v. Jackson* (f), Lord *Eldon* C. J., was of opinion that a bill of parcels in which the vendor's name was printed in the body of the instrument, was a sufficiently signed memorandum under the 17th section of the Statute of Frauds, although he did not decide the case on that ground. But in *Johnson v. Dodgson* (g), where the defendant, the purchaser, wrote in his own book, "Sold *John Dodgson*," and this was signed by the plaintiff's agent, it was

(a) 2 C. & P. 528.

(b) 2 C. & M. 459.

(c) 11 A. & E. 934; S. C. 3 P. & D. 529.

(d) 1 Esp. N. P. C. 190.

(e) 3 Lev. 1.

(f) 2 B. & P. 238.

(g) 2 M. & W. 653.

considered a memorandum binding on the defendant. *Stokes v. Moore* (a), and *Hubert v. Treherne* (b), merely shew that the introduction of a name incidentally, and not for the purpose of authentication, will not do. And the former case was distinguished on that ground in *Ogilvie v. Foljambe* (c), where it was held that, provided the name be inserted in an instrument in such a manner as to have the effect of authenticating it, there is a sufficient signature, and that it does not matter in what part of the instrument the name is found. The third letter in the present case is of itself sufficient, but all the letters may be taken together; *Dobell v. Hutchinson* (d).

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*Whateley* contra. Although the authorities appear to establish that the introduction of a name for the purpose of authentication, in any part of an instrument, amounts to a signature under the Statute of Frauds, yet it may be doubted whether the Courts in so deciding have not departed from the intention of the legislature, and whether they would now so decide if the matter were *res integra*. The recent statute of Wills, 7 & 8 Will. 4 & 1 Vict. c. 26, s. 9, requires the will to be "signed at the foot or end thereof," for the purpose, probably, of avoiding the difficulties in which the Courts had become involved by the authorities with respect to signature. In *Selby v. Selby* (e), where a letter was subscribed, "Do me the justice to believe me the most affectionate of mothers," Sir *William Grant*, M. R., was of opinion that mere identification was not enough, and that signature was necessary. In *Ogilvie v. Foljambe* (c) the agreement was made out from a correspondence, and not from a single document. *Hubert v. Moreau* (f) is in the defendant's favor, and has not been satisfactorily distinguished.

(a) 1 Cox, 219.

(b) 3 M. & Gr. 743.

(c) 3 Mer. 53.

(d) 3 A. & E. 355; S. C. 5 N. & M. 251.

(e) 3 Mer. 2.

(f) 2 C. & P. 528.

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But, even if the letters were properly signed, the promise contained in them is conditional. The third letter shews it was written in answer to one from the plaintiff, and forms part of a negotiation, the whole of which does not appear. The gist of it is, that the defendant refuses to give a bill. It has been held that a promise to revive a debt after bankruptcy must be distinct and explicit. *Brook v. Wood* (a), *Fleming v. Hayne* (b).

LORD DENMAN C. J.—I have no doubt that the third letter, coupled with evidence of the amount of the debt, would have been sufficient to prove the issue. It states that the defendant will not give a bill, but it also states that he will settle the account. The effect of the other letters is not so clear. With regard to the question whether the letters were signed so as to satisfy the statute, there can be no reason for construing this statute differently from Lord *Tenterden's* act and the Statute of Frauds. I think that the omission of the christian name is not material. This case is distinguishable from *Hubert v. Moreau* (c), where in truth there was no name at all.

PATTESON J.—I do not see why this statute should be construed differently from the Statute of Frauds and the Statute of Limitations. The name in these letters was not introduced incidentally, but for the purpose of authenticating them, and it was the same thing as if they had commenced with "I promise," and had then been subscribed with the defendant's full name. The statute requires in terms that the promise should be "signed," and, if the Statute of Frauds had not been construed as it has, I should perhaps have been reluctant to say that what has been done in this case amounts to a signature, but, after the decisions upon the Statute of Frauds, we cannot do otherwise than conform to them in the construction of this

(a) 13 Price, 667.

(c) 2 C. & P. 528.

(b) 1 Stark. N. P. 370.

statute. I had some doubt whether the letters contained any promise. It did not appear in what order they were written, nor whether there were any other letters, nor what was the course of the negotiation. This uncertainty however is the fault of the defendant. After considering the third letter, however, I am of opinion that it contains an unconditional promise.

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COLERIDGE J.—I am of the same opinion. It is admitted that the signature in this case would have satisfied the Statute of Frauds, and I can see no distinction between that statute and the present, and I think that the cases under the Statute of Frauds were rightly decided. The Bankrupt Act requires that the writing shall be signed, but not that the name shall be subscribed. It is enough if a party at the beginning of an instrument writes his name so as to govern what follows. There is nothing in the omission of the christian name. On the other point I had some doubt. The letters were not dated, and the plaintiff had them read in the order he pleased, so that I could not tell whether they terminated in a promise. But I now think that it is enough, if in the course of the negotiation the defendant chooses to make a distinct promise, and that he does make such a promise in the letter which was read last.

WIGHTMAN J.—The result of the authorities is that, if a party insert his name in any part of an instrument for the purpose of authenticating it, it is enough. I think also that the letter read last contained an unconditional promise to settle the account, and that it does not matter whether the letter was written before or after the others.

Rule discharged.



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Feb. 8, 1844.

It is no ground for setting aside a writ of sci. fa. as irregular, that there has been no return to an alias fi. fa. issued on the same judgment, although something has been done under that writ, because this may be the subject of a plea to the sci. fa.

It is no sufficient answer to the sci. fa., that a writ of fi. fa. issued under the same judgment within a year after the judgment, unless it appear that the debt was satisfied by the levy which took place under such writ.

A plea to a sci. fa. stating as above, and that the sheriff entered under the writ, and seized goods and chattels in the defendant's house, is therefore bad, for not aver-

ring that the goods and chattels were the defendant's, and that they produced satisfaction: also (per *Patteson J.*) for averring that the writ was returned and filed, without adding that there is a record of such writ and return.

Where such a plea is pleaded, although with a conclusion in abatement, the proper judgment is quod habeat executionem.

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IN this case a rule had been obtained calling on the plaintiff to shew cause why the writ of sci. fa., sued out on a judgment recovered against the defendant, should not be set aside for irregularity.

It appeared that the plaintiff had obtained a writ of fi. fa. against the defendant, to which the sheriff had returned nulla bona. He had afterwards obtained writs of alias fi. fa. and ca. sa., to which no return had been made when the sci. fa. issued. The defendant had been discharged out of custody under the writ of ca. sa. as irregular, on the ground that there had been no return to the alias fi. fa. And the irregularity now complained of was, that the sci. fa. had thus issued before the return to the same writ.

In Michaelmas Term, 1843 (a),

Willes shewed cause. If anything had been done under the fi. fa., it is admitted that the plaintiff could not have issued another writ of execution until the former was returned; but when nothing has been done, and the writ treated as a nullity, the scire facias may issue. Secondly, the scire facias is a proceeding in the nature of an action, and that it has been issued pending a former writ is the ground for a plea, *Com. Dig. Pleader*, 3 L. 15; and it is contrary to all principle to decide summarily on motion what can be decided in pleading. It is analogous to the case of an action on a judgment; *Green v. Elgie* (b).

The defendant in person contra.

Cur. adv. vult.

(a) November 24, before Lord and Coleridge Js.
Denman C. J., Patteson, Williams

(b) 3 B. & Ad. 437.

The judgment of the Court was delivered on the following day by Lord DENMAN C. J.—In this case a rule was obtained by the defendant to set aside the writ of *sci. fa.* sued out by the plaintiff, as irregular, on the ground that a writ of *fi. fa.* had been previously issued, executed, and returned, and an alias *fi. fa.* executed, but not returned. Cause was shewn on two grounds: first, that nothing had been done under the alias *fi. fa.* and that, therefore, it was unnecessary to return it. But there is a conclusive reply to this. It appears that in this case a writ of *ca. sa.* had been set aside for the want of a return of this same writ of alias *fi. fa.* We must take it, therefore, that enough had been done under that writ, to make it necessary to have returned it before another ordinary writ of execution could issue. The second ground for resisting the rule was, that it is unnecessary to take any specific notice of prior writs of *fi. fa.* on the issuing of the writ of *sci. fa.*, because that writ being in the nature of an action, and pleadable to, the defendant may plead to it the taking of his goods under the former writ, and that, although such writ has not been returned, nor the plaintiff, in fact, satisfied. There is no doubt that the law is so; for which we refer to *Mountney v. Andrews* (a), and *Clerk v. Withers* (b). It was contended that this distinguished the writ of *sci. fa.* from writs of execution, and brought it within the rule applicable to the case of an action of debt on the judgment, in which the writ cannot be set aside as irregular, on the ground that the *fi. fa.* has been issued and not returned, or any part of the debt levied, as these facts may be pleaded in the whole, or in part, as an answer: *Green v. Elgie* (c). We are of opinion that this distinction is sound in principle. To a *fi. fa.* or *ca. sa.* nothing can be pleaded. The Court will require a return to be made of what has been done under one writ, before it will allow its process to be a second time put in force. But the same reasoning does not hold

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(a) Cro. Eliz. 337.

(c) 3 B. & Ad. 437.


(b) 2 Lord Raym. 1072.

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where the plaintiff has recourse to that which is in effect in the nature of an action, and in which the defendant has an opportunity of defending himself by pleading what has been done under the *fi. fa.*, and there is the more reason for holding this, because (as we have already intimated) proceedings under that writ are equally a defence to him, according to the case first cited, whether the sheriff has returned the writ or not, or the plaintiff has received any satisfaction or not, if only the sheriff has seized to the amount of the debt that he levies. We think, therefore, that this rule ought to be discharged.

Rule discharged.

The defendant afterwards pleaded the following plea to the *sci. fa.* That within a year after the said judgment was signed, viz. on the 20th November, 1839, the plaintiff obtained a writ of *fi. fa.* in the sum recovered under the said judgment, directed to the sheriff of Surrey, under which the sheriff entered and took possession of all the goods, chattels and effects, in and upon the dwelling-house of the said defendant, at No. 19, West Square, Southwark, in the said county; and that the said writ of *fi. fa.* was returned and filed on or about the 21st December, 1839. Verification. Wherefore, inasmuch as the said plaintiff has come into this court within a year after the said judgment was entered up, and sued out the said writ of *fi. fa.*, and has already obtained and is now in possession of the remedy which he now seeks under the said writ of *sci. fa.*, and as the writ of *sci. fa.* is given by the statute in that case made and provided as a remedy only to such as have not come into court within a year after the judgment is entered up, and sued out a writ of execution, and are therefore disabled from suing out a writ of execution without it, the said defendant prays judgment of the said writ of *sci. fa.* and declaration, so that the same may be quashed. Special demurrer. Causes, that the plea does not state what goods and chattels, or what amount of goods and

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chattels were seized by the sheriff under the *fi. fa.*; nor in whom was the property of the said goods and chattels; nor whether any sale took place under the seizure; that it does not state with sufficient certainty that the *fi. fa.* was founded on the judgment in question, nor that the same can now be executed or continued; that it does not state what return was made to the *fi. fa.*; nor the time of the return; nor in what court it was returnable, &c.; that it does not shew with sufficient certainty that the plaintiff can have execution of the damages and interest without the *sci. fa.* That although the *fi. fa.* is stated in the plea to have been returned and filed, yet it is not alleged therein that there is any record of the *fi. fa.* and return, or either of them, nor is reference made in the plea to any such record; nor does the plea conclude with a verification by the record; that it wrongly concludes as a plea in abatement, not consisting of matter in abatement; and that it does not give a better writ; and, if a plea in abatement, is bad for want of a proper commencement, and repugnant for commencing in bar, and concluding in abatement, &c. Joinder in demurrer.

Willes for the plaintiff. There is no precedent for such a plea as this. There may, no doubt, be a plea to a *sci. fa.*, shewing that the debt has been satisfied by an execution under a former writ; or that goods have been taken by the sheriff to the amount of the debt; *Wilbraham v. Snow* (a); *Com. Dig. Pleader*, 3 L. 15. But there is no averment here that the debt was levied; the defence is rested solely on the allegation that the sheriff entered under a writ of *fi. fa.* within a year after the judgment for the sum recovered under the same judgment, and took possession of the defendant's goods and chattels. Next, the plea is bad, as a plea in abatement, for not giving a better writ. It commences as a plea in bar; but the conclusion is in

(a) 2 Saund. 47 a, note (1).

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abatement, and the plea may therefore be so treated;
Steward v. Greaves (a).

The defendant in person contra.

Willes was not called on to reply.


LORD DENMAN C. J.—There is no authority to shew that a scire facias might not issue, whatever goods of the defendant may have been seized under the former writ. There are several objections to the averments of the plea in point of form; but, supposing those objections overcome, the whole plea amounts only to an insufficient answer; it does not shew that the judgment debt was satisfied through the proceedings under the former writ.

PATTERSON J.—Although a scire facias may not be necessary where a former writ has issued within a year after the judgment, it does not follow that it may not issue. There are no doubt authorities which shew that it is an answer to the sci. fa. that the whole debt is levied already. Ot, if it be shewn that a part has been levied, that will prevent execution under the sci. fa. except as to the residue. But the pleader has not stated this. The plea only alleges that the sheriff seized all the goods and chattels in the defendant's house; not even that they were the defendant's goods and chattels. It then sets out that the writ was returned and filed, not that any money was levied under it. The question therefore is narrowed to this, whether it is a sufficient objection to the issuing of a sci. fa., that a writ of execution has been issued for the debt within a year after the judgment. For this there is no authority. I think, in addition, that there should have been an averment of a record of the writ and return. But if the plea had been well pleaded in this respect, I am still of opinion it would not have amounted to an answer.

(a) 10 M. & W. 711.

WIGHTMAN J. concurred (a).

The defendant contended that the judgment could only be *respondere ouster*.

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Willes cited *The Dundalk Western Railway v. Tapster* (b).

PER CURIAM, judgment for the plaintiff quod habeat executionem, &c.

(a) Coleridge J. was absent. (b) 1 Q. B. 667; S. C. 1 G. & D. 657.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

NEWLANDS v. HOLMES (c).

IN this case the judgment of the Court of Queen's Bench (*Holmes v. Newlands* (d)) had been affirmed by the Exchequer Chamber (*Newlands v. Holmes* (e)). On taxation of the costs in error, the Master allowed double costs to the defendant in error, under 2 stat. 13 Car. 2, c. 2, s. 10, which enacts that "if any person or persons shall sue or prosecute any writ or writs of error for reversal of any judgment what-

1. Where a writ of fi. fa. had issued, and the sheriff had taken possession, but the execution was rendered ineffectual by adverse proceedings in equity, and, after the sheriff had taken possession, a writ of error was sued out by

(c) Decided in Trinity Term, 1843 (June 6).

(d) 11 A. & E. 44; S. C. 3 P. & D. 128.

(e) 3 Q. B. 679.

the defendant below:—*Held*, that such writ was issued "afore execution had," under stat. 3 Hen. 7, c. 10.

2. Under the enactment of that statute, that where the plaintiff is delayed of execution by a writ of error, and the judgment be affirmed, "the person against whom the writ of error is sued shall recover costs and damages for his delay" (extended to double costs by 13 Car. 2, st. 2, c. 2, s. 10):—*Held*, that when plaintiff in error had not put in bail, under 3 Jac. 1, c. 8, and 6 Geo. 4, c. 96, s. 1, the execution was not "delayed" within the meaning of the statute, even for the four days allowed by practice for putting in bail; and therefore, although the judgment was affirmed, the defendant in error was not entitled to double costs.

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soever, given after any verdict in any of the Courts aforesaid, and the said judgment shall afterwards be affirmed, then every such person or persons shall pay unto the defendant or defendants in the said writ or writs of error his or their double costs, to be assessed by the Court where such writs of error shall be depending, *for the delaying of execution.*"

In Hilary Vacation, 1843, the plaintiff in error obtained a rule of the Court of Exchequer Chamber, calling on the defendant in error to shew cause why the taxation should not be reviewed.

It appeared that judgment was signed by the plaintiff below in the action (*Holmes v. Newlands* (a), which was an action of trespass), on November 25, 1839. On the same day a *fi. fa.* was sued out by *Holmes*. On the 28th the sheriff took possession, and on the same day an injunction was issued out of Chancery at the suit of *Newlands'* wife to the sheriff, to restrain him from seizing. This injunction was granted on a bill filed by the wife of *Newlands*, claiming the goods as her separate property. The sheriff withdrew from possession, and returned *nulla bona*. After some other intermediate proceedings in equity, the Master reported (Jan. 29, 1841) that the goods were her separate property, and as such not liable to the execution.

On December 21, 1839, an alias *fi. fa.* had issued at the suit of *Holmes*, under which the sheriff retook possession; but, in consequence of the proceedings before the Master, the sheriff again withdrew, December 31, 1840, there having been no return to the writ of December 21.

On January 11, 1842, *Holmes* obtained a *ca. sa.* against *Newlands*, who was arrested on the 15th, but discharged by a rule of the Court of Queen's Bench on the 10th February, 1842, on the ground that the alias *fi. fa.* ought to have been returned before the *ca. sa.* issued.

On the 26th April, 1842, *Newlands* brought a writ of

(a) 11 A. & E. 44; S. C. 3 P. & D. 128.

error, which was relied on by the defendant in error as having delayed the execution. *Newlands* applied to proceed in error without putting in bail, but this was refused. Judgment was affirmed in Trinity Vacation, 1842. *Newlands* stated in his affidavit that "the said writ of error was sued out after execution had, and never was a stay or supersedeas of execution."

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Martin shewed cause(a). He cited *M'Cormick v. Melton*(b), *Collins v. Beaumont*(c), Rule Hil. 4 Will. 4, Reg. Gen. 9, *Lane v. Bacchus*(d), *Gravall v. Stimpson*(e), *Jaques v. Nixon*(f).

'The plaintiff in error, in person, contrà, cited 1 *Hullock* on Costs, 286, *Wright v. Fairfield*(g).

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court. — This was a rule obtained by the plaintiff in error, calling upon the defendant in error to shew cause why the Master should not review his taxation of costs upon the affirmance of judgment upon the writ of error. The complaint on the part of the defendant in error is, that the Master, in taxing the costs of the plaintiff below, has given him double costs under 2 stat. 13 *Car.* 2, c. 2, s. 10, on the ground of delay; whereas, as the plaintiff in error contends, there has been no delay of execution, and no costs were allowable. The defendant in error, on the other hand, contends that, even if no actual delay has been occasioned, yet the proper construction of the several statutes authorises the Master to give double costs in all cases where the judgment for the plaintiff below has been affirmed after verdict; but that, at

(a) May 12, 1843, before Tindal C. J., *Erskine* and *Cresswell* Js., *Parke*, *Alderson* and *Rolfe* Bs.

(b) 1 C. M. & R. 525; S. C. 3 Dowl. P. C. 215.

(c) 10 A. & E. 225; S. C. 2 P.

& D. 363.

(d) 2 T. R. 44.

(e) 1 Bos. & P. 478.

(f) 1 T. R. 279.

(g) 2 B. & Ad. 959.

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all events, there has been the delay of four days in the present case, which the plaintiff in error had in order to put in and perfect bail in error.

The first statute, 3 *Hen. 7*, c. 10 (and which is the ground work of the whole law as to the costs in error), recites that, "where oftentimes plaintiff or demandant, that have judgment to recover, be delayed of execution, for that the defendant or tenant 'sueth a writ' of error to annul and reverse the said judgment, to the intent only to delay execution of the said judgment," and then proceeds to enact, "that if any such defendant or tenant sue afore execution had, any writ of error to reverse any such judgment, in *delaying* of execution, that then, if the same judgment be affirmed good in the said writ of error, and not erroneous, &c., the said person or persons, against whom the said writ of error is sued, shall *recover his costs and damage for his delay and wrongful vexation* in the same, by discretion of the justice afore whom the said writ of error is sued."

And we think the legal construction of this statute is, that costs or damage are given thereby in the case where the plaintiff who has obtained the judgment in the Court below is actually delayed in his execution, and not otherwise; the provision, that such costs and damage shall be in the discretion of the Court, implying, as it appears to us, that they may be greater or less, according to the actual delay, and consequently that if there be no delay there shall be no costs or damage. And although if no subsequent statute had been passed requiring bail in error, and the question had turned upon the statute of *Hen. 7* alone, it might have been contended that in every case where a writ of error is sued out there must be some delay of execution, yet an important difference in this respect is created by the statutes relating to bail in error, as will hereafter appear.

And as to stat. 2, 13 *Car. 2*, c. 29, which recites the stat. 3 *Jac. 1*, c. 8, as the preamble to the 8th section, and then

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proceeds in the 10th section to give double costs, where the judgment for the plaintiff below is affirmed after verdict, the statute must, we think, be considered as made in *paria materia* with the former, and to be applicable to those cases only where single costs were given by the former statute, that is, to those cases only where there is actual delay.

Now, in order to make a writ of error a supersedeas, and consequently a delay of execution, "two things are requisite," as Mr. Justice *Buller* observes in *Gravall v. Stimpson* (a); there must not only be an allowance of the writ of error, but bail in error must be put in and perfected.

The statute 3 *Jac.* 1, c. 8, which is extended to all personal actions by stat. 6 *Geo.* 4, c. 96, is express upon the point, that "no execution shall be stayed or delayed upon or by any writ of error, or supersedeas thereupon (without special order), unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, shall first, before such stay made or supersedeas to be awarded," enter into the recognizance by the statute of *Jac.* 1 directed. In this case no such recognizance of bail in error was put in, and although the plaintiff below thought it prudent to wait for the four days, in order to see whether it was put in or not, yet in the event which has happened, it appears he might safely have sued out his execution *instanter* after signing judgment, and therefore, in fact, no delay of execution took place.

We therefore think the rule must be made absolute.

Rule absolute.

(a) 1 Bos. & P. 478.



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Held in the Exchequer Chamber, (reversing the judgment of the Queen's Bench.)

No action lies against the sheriff or his officer for arresting a person attending Court as a witness, although it be alleged that the defendants knew that he was privileged and arrested him maliciously.

And for maliciously detaining him after the Court had ordered his discharge, and the defendants had notice thereof, *quære*, if any action lies, but, at all events, if any, it would be trespass, and not case.

MAGNAY, ROGERS and WALTER v. BURT.

ERROR from the Queen's Bench, in the case of *Burt v. Magnay, Rogers and Walter*, on the following judgment.

The declaration stated that heretofore, and before and at the time of the committing of the grievance thereafter mentioned, the defendants *Magnay* and *Rogers* had been and were sheriff of Middlesex, and the defendant *Walter* was then an officer of the said other defendants; and that before the committing, &c., on, &c., an order was made by the Court of Review, in the matter of one *Henry Charles Curlewis*, of, &c., against whom a fiat in bankruptcy had issued, whereby the said Court of Review did order that it be referred to *William Scrope Ayrton*, Esquire, an officer of her Majesty's Court of Bankruptcy, to inquire and state whether, at the date and suing forth of the said fiat, there was any and what debt due from the said *H. C. Curlewis* to plaintiff, the petitioning creditor under the said fiat, in the said order mentioned, sufficient in amount to support the said fiat, and that for better making the said inquiry, all necessary and proper parties were severally to be examined before the said *W. S. Ayrton*, upon interrogatories or otherwise, touching the matters in question, as the said *W. S. Ayrton* should think fit, &c., and that the said *W. S. Ayrton* was to be at liberty to examine the said *H. C. Curlewis*, the said petitioner in the said order mentioned, and the said plaintiff, the said respondent in the said order mentioned, or either of them, as by the said order, &c. will more fully appear.

That afterwards, and before the committing of the grievances, &c., to wit, on, &c., the said *W. S. Ayrton* did, in pursuance of the said order, by a summons in writing, signed by the said *W. S. Ayrton*, summon plaintiff (defendant in error) to appear before him on Tuesday, the 28th day of June, 1842, at eleven o'clock in the forenoon, at the office of the Registrar in Bankruptcy, Quality Court,

Chaucery Lane, there to be examined by or before him the said *W. S. Ayrton*, in the aforesaid matter of the said *H. C. Curlewis*. That afterwards, and before the committing, &c., to wit, on, &c., plaintiff was duly served with the said summons, and in obedience thereto he did afterwards, to wit, at eleven o'clock, on, &c., the day and year in the said summons mentioned, attend at the said Registry Office in his own person, before the said *W. S. Ayrton*, in the aforesaid matter, under the aforesaid reference; and that afterwards, to wit, on the day and year last aforesaid, and after plaintiff had been attending at the Registry Office, before the said *W. S. Ayrton*, for the purpose aforesaid, and whilst he was leaving the said Registry Office for the purpose of returning to his place of abode, and was returning to his place of abode, defendants, so being such sheriff and such officer as aforesaid, and before any reasonable time had elapsed for the return of plaintiff to his said place of abode, well knowing that plaintiff was then privileged from arrest, and disregarding their duty in that behalf, wrongfully and maliciously took and arrested plaintiff by his body, and then kept and detained plaintiff in custody for a space of time, to wit, five days, after defendants had been requested to discharge plaintiff from and out of their custody, under and by virtue of a certain writ of *capias ad satisfaciendum*, directed to defendants *Rogers* and *Magnay*, as such sheriff of Middlesex, whereby our said Lady the Queen commanded the said sheriff that he should take plaintiff, &c., so that he might have his body before the Barons of her Majesty's Exchequer, &c., to satisfy one *S. L. Curlewis* the sum of 300*l.*, which by the consideration and judgment of the said Court was then and there adjudged to the said *S. L. Curlewis* for his damages, &c., as by the record, &c.

That afterwards, to wit, on, &c., by a certain order then made by the said Court of Review, in the matter of the said *H. C. Curlewis*, a bankrupt, bearing date the day and year aforesaid, it was ordered that the sheriff of Middlesex should discharge plaintiff out of the custody of defendants

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Magnay and Rogers as such sheriff of Middlesex as aforesaid, in which custody plaintiff was detained at the suit of the said *S. L. Curlewis*; of all which premises defendants had notice. Yet defendants, further disregarding their duty in that behalf, did not nor would then discharge plaintiff out of the custody of defendants *Magnay and Rogers* as such sheriff of Middlesex as aforesaid, but on the contrary thereof wrongfully, unlawfully and maliciously, and against the will of plaintiff, kept and detained plaintiff in their custody for a long time, to wit, for a space of five hours, after they had notice of the said last mentioned order.

The plaintiff having obtained a verdict in this case in Hilary Term, 1843,

Kennedy, in the same term, moved in arrest of judgment. The declaration does not disclose any ground of action against the sheriff. The sheriff cannot take notice of privilege, it must be pleaded: per *Gould J.* in *Crossley v. Shaw* (a). In *Cameron v. Lightfoot* (b) it was held that trespass would not lie for arresting a person privileged redeundo from the Court of Common Pleas; but the whole reasoning of *De Grey C. J.*, in delivering the judgment of the Court, shews that no action at all will lie for such a cause. "The question," says the learned Chief Justice, "is, whether the privilege of the King's Court extended to suitors redeundo, so vitiates an arrest or suspends the operation of the writ, that the taking a man thereon becomes an act of trespass to the party taken. The ancient way of availing oneself of the privilege of the Courts was by suing out a writ of privilege: see *Co. Entr.* 436, 437; *Rast.* 474, &c., for suitors, jurors and witnesses. But this privilege is not considered as the privilege of the person attending the Court, but of the Court which he attends; and therefore the allowing or not allowing the privilege is discretionary, and it hath been disallowed in

(a) 2 W. Bl. 1085.

(b) 2 W. Bl. 1190.

collusive actions, *Rast.* 476; and in vexatious ones, 11 *Mod.* 79; or where the party attended as a volunteer and not upon process, *Salk.* 544. The writ of privilege at common law was always accompanied by either a habeas corpus or a certiorari, as the case required. If on the return the party appeared entitled to privilege, he was delivered (or his goods, as the case might be) and a superseas was granted; otherwise a procedendo issued. But still the irregularity, even in cases of privilege, did not lie in the process itself, but in the service of it. Therefore in *Co. Entr.* ubi supra, where the party was detained upon six actions, and the privilege was allowed, still the Court obliged him to give bail. It is not a void process; for it remains as the foundation of subsequent proceedings. So in *Clark v. Molineux*, 1 *Keb.* 845; *Raym.* 100; 1 *Lev.* 159; 1 *Sid.* 269; where it was held that the quarter sessions could not discharge but might punish for the contempt in arresting an attendant on their Court, the arrest was not held to be void. The modern way of giving the same relief as was had by the tedious method of a writ of privilege, is by a summary motion to discharge. This was pursued in the case at bar. But Courts will be very scrupulous in discharging, if their allowance of privilege will lay a ground for an action of trespass. A trespass (by the way) must be certain, and either an injury to the party or not so at the time the act is done. It cannot depend on the subsequent discretion of the Court in granting or refusing the discharge. And therefore it has been held in *Vandevald and Lluellyn*, 1 *Keb.* 220, that a witness arrested during his attendance hath no remedy but by habeas corpus to deliver him. But the officer, &c., who knew the reason of his attendance, might be attached for the contempt. So in *Styles' Pract. Reg.* 195, 227, 395, 8vo., a like distinction is taken. If one be arrested on a writ unduly obtained, false imprisonment lies against the plaintiff. But, if one who hath a suit depending be arrested eundo vel redeundo, the Court upon motion will set him at liberty, and punish

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the party that arrested him, if he knew the cause of his attendance. In none of the books is there any intimation of an action being maintainable for such an arrest, but the question has always been merely the delivery of the party; the process still continuing legal and capable of being executed at a subsequent time, when privilege does not intervene." This case was recognised in *Tarlton v. Fisher* (a). The sheriff may if he pleases refuse to arrest, and take the chance of the privilege being allowed; but, if he is sued for not arresting a person who claimed privilege, the Court will not stay the proceedings: *Sherwood v. Benson* (b). [Coleridge J. The declaration states the defendants knew the plaintiff was privileged, and that they arrested him *maliciously*.] That is immaterial; if the arrest per se was lawful, they had a right to make it maliciously; malice in such a case is immaterial; it is not like a question of bonafides, as in *Lucas v. Nockells* (c). [Patteson J. Your argument may apply to an action of trespass, but malice seems very material in an action on the case.] If any action at all lies it is trespass. [Patteson J. How so, if malice be the gist of the action?] The malice must be manifested by an act, and the form of action will be case or trespass, according to the act. [Wightman J. In *Tarlton v. Fisher* (a), Lord Mansfield C. J. says, "In trespass innocence of intention is no excuse; in case, the whole turns upon it; malice or the quo animo is the very gist of the action."] Willes J., in the same case, intimated that "*trespass* might lie if the party were detained longer than was necessary for making the proper inquiries." In *Stokes v. White* (d) the defendant sued out bailable process against the plaintiff, his debtor, and the sheriff arrested the plaintiff whilst he was privileged as a witness. The plaintiff brought an action on the case, and the case went off upon the point that the action was not maintainable, because it did not appear that the defendant had any knowledge that the

(a) 2 Doug. 671.

(b) 4 Taunt. 631.

(c) 10 Bing. 157.

(d) 1 C. M. & R. 223.

plaintiff was attending as a witness when the defendant delivered the writ to the sheriff to be executed. [*Cole-ridge J.* You must go the length of saying that, if any special damage arose from unreasonable detention, no action would lie.] The only special damage in this case would be the costs of applying for the discharge, but the Court of Bankruptcy might, if it pleased, have given a remedy by making the sheriff pay costs.

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LORD DENMAN C. J.—I have no doubt, where the sheriff acts apparently under a legal authority, but maliciously, and thereby produces damage to the plaintiff, that an action on the case will lie.

PATTESON J.—The question is, whether any action is maintainable under the circumstances, and if it is maintainable, whether it should be trespass or case. Although it has never been decided, I think it clear that, where the sheriff maliciously arrests a privileged person, an action will lie. But it is said that, if the malice makes the arrest illegal, the form should be trespass. But where the gist of the action is malice, and the fact of arrest is itself legal, I think case is the right form.

COLERIDGE J.—I think the authorities shew that, if any action lies, it should be case, for it is not the act of arrest per se, but the doing it maliciously that gives the right of action. I have no doubt that an action will lie if a public officer acts maliciously.

WIGHTMAN J. concurred.

Rule refused (a).

The case in error was argued in Easter Vacation, 1843 (May 13), before *Tindal C. J.*, *Erskine* and *Cresswell* Js., and *Parke*, *Alderson* and *Rolfe* Bs.

(a) A rule was also refused on the ground of misdirection.

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Kennedy for the plaintiffs in error (the defendants below), as to the first breach for arresting, cited the following authorities in addition to those cited in the Court below:

1. No action at all lies for the arrest. It is not a matter of course that the privilege should be allowed; it would not be allowed unless the attendance in Court has been *bonâ fide*: *Meekins v. Smith* (a). In *Tarlton v. Fisher* (b), *Ashhurst J.* says, "It would be extremely hard indeed upon a sheriff or his officers, if they were bound to inquire into the truth of that exemption (i. e. the privilege), and determine upon it at their own peril." In *Whalley v. Pepper* (c), *Littledale J.* held that case was maintainable against the plaintiff in an action for causing a privileged person to be arrested.

2. The form of action for the arrest should have been trespass. The arrest is trespass; and the trespass cannot be waived in the present case any more than in an action for a battery. In *Smith v. Egginton* (d) trespass was brought for assault and false imprisonment, where it was alleged that the defendant had not discharged a prisoner for contempt of the Court of Chancery in proper time after the arrest, as prescribed by stat. 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule. The Court certainly held that the action ought to have been case, but at the same time the Court seemed to think that no action would lie at all.

3. As to the second count or breach, for detaining the plaintiff an unreasonable time after the Court of Bankruptcy had ordered his discharge. The form of action, if any action at all can be maintained, should be trespass. The detention was a continuing trespass. In *Lambert v. Hodgson* (e), to an action for an assault and false imprisonment, the defendant pleaded that he, being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the

(a) 1 H. Bl. 636.

(b) 2 Doug. 671.

(c) 7 C. & P. 506.

(d) 7 A. & E. 167; 8 C. 2 N. & P. 143.

(e) 1 Bing. 317.

action. Replication de injuriâ and issue thereon. It appeared that defendant, in addition to detaining plaintiff till he satisfied the demand in the action, detained him an hour longer, till he paid the expenses of defendant's becoming bail. Held, that this was one continuing trespass, and that therefore to recover for that part of it which was unjustifiable the plaintiff ought to have newly assigned. The same opinion was expressed by *Bayley J.* in *Martin v. Francis* (a). See also *Blessley v. Sloman* (b), *Morgan v. Hughes* (c), *Turner v. Hawkins* (d), *Ogle v. Barnes* (e), and *Leame v. Bray* (f). If case may be maintained for the subject-matter of the first breach or count, and if trespass is the proper form of action for the subject-matter of the second breach or count, then there is a misjoinder.

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Jervis contra. *Tarlton v. Fisher* (g), *Cameron v. Lightfoot* (h) and *Crossley v. Shaw* (i), all shew that the arrest is not ground for an action of trespass. It is said that the sheriff cannot know whether the claim of privilege is well founded. But the declaration alleges that he was cognizant of the privilege in this case, and that he arrested maliciously. Besides, the ignorance of the sheriff is no excuse; he is liable in trover to the assignees of a bankrupt, whose goods he has sold under a fi. fa., after a secret act of bankruptcy and before the issuing of the commission; *Balme v. Hutton* (k). Even in cases where an act is done under sufficient authority, the animus of the agent may render the act illegal: *Lucas v. Nockells* (l). So in *Porter v. Weston* (m), where defendant induced the bail to render his principal by saying that the latter was likely to abscond, it was held that no action lay against the defendant at the suit of the principal, without alleging and proving express

- (a) 1 Chitty, 244.
- (b) 3 M. & W. 40.
- (c) 2 T. R. 225.
- (d) 1 B. & P. 472.
- (e) 8 T. R. 186.
- (f) 3 East, 593.

- (g) 2 Doug. 671.
- (h) 2 W. Bl. 1190.
- (i) 2 W. Bl. 1085.
- (k) 9 Bing. 471.
- (l) 10 Bing. 157.
- (m) 5 Bing. N. C. 715.

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malice. *Oakes v. Wood* (a) seems to establish no more than that the motive inducing a person to exercise authority given by law, could not be inquired into where the replication to a plea justifying under such authority was de injuriâ.

Case is the proper form of action. The complaint is, that the defendants, under colour of the law, have acted vexatiously and oppressively. In *Heywood v. Collinge* (b) it was held that an action on the case lay for maliciously and without probable cause arresting the plaintiff pending a former suit by defendant, for the same cause of action in which the plaintiff had been arrested and discharged; and the judgment in that case went entirely upon the malice by which the act was accompanied.

As to that which is called the second breach or count, it is merely part of the one entire complaint. In respect of the latter part as well as the former, malice is alleged, and, even if trespass would lie, it does not follow that case also will not lie.

Kennedy in reply. The declaration states merely that the privilege existed, not that it was claimed. [*Alderson* B. referred to *Luntley v. Battine* (c), as to the discretion of the Court, whether to discharge a prisoner or to leave him to his writ of privilege.]

Cur. adv. vult.

TINDAL C. J. delivered the judgment of the Court as follows (d):—The main question in this case, which has been brought before us by the plaintiff in error, is, whether any action is maintainable against the sheriff for arresting a person who, at the time of such arrest, is privileged by reason of his attendance to give evidence before a court of competent jurisdiction. The plaintiff has declared in case, and in the first count of his declaration alleges, that whilst he was returning to his place of abode from the Registry

(a) 2 M. & W. 791.

(c) 2 B. & Ald. 234.

(b) 9 A. & E. 268; S.C. 1 P. & D. 202. (d) In Mich. Vac. last (Nov. 28.)

Office of the Court of Review in Bankruptcy, to which he had been summoned by an order of the said Court, for the purpose of being examined under a fiat, the defendants, well knowing that he was privileged from arrest, wrongfully and maliciously arrested him under a writ of ca.sa., directed to the two first-named defendants as the sheriff of Middlesex. And if an arrest under such circumstances affords no ground of action at law for damages, but is only the subject of an application to the Court under whose authority the party had been compelled to appear as a witness, the plaintiff below will be out of Court as to the first count or breach in his declaration.

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And we are of opinion that the arrest by the sheriff under a writ from any of the Queen's Courts, of a person privileged from arrest by reason of attendance as a witness under the process of another Court, does not form the ground of any action at law.

That an action of trespass and false imprisonment is not maintainable has been long settled by the two cases of *Cameron v. Lightfoot (a)* and *Tarlton v. Fisher and others (b)*. And had it not been for the question made by Lord Mansfield in the latter case, at the end of the opinion given by him, we should have thought the question equally settled as to an action on the case, for the reasons upon which the judgment of the Court proceeds, as well in the one case as the other, appears to apply to both forms of action.

That broad ground is, that the privilege, the breach of which is the subject of complaint, is not to be considered (as it was accurately laid down by Lord Chief Justice De Grey, in the case of *Cameron v. Lightfoot (a)*) "to be the privilege of the person attending the Court, but of the Court which he attends. And therefore the allowing or not allowing the privilege is discretionary; and it hath been disallowed in collusive actions, and in vexatious ones, as in the Anonymous case in 11 Mod. 79, or where the party attended as a volunteer, and not upon process."

(a) 2 W. Bl. 1190.

(b) 2 Doug. 671.

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The extreme difficulty cast upon the sheriff of determining whether the privilege, set up by the party, is founded in truth, is another ground for holding the action not to lie. He cannot, as was observed by the Court in *Tarleton v. Fisher* (a), administer an oath, and he must refuse to execute the process of the Court at his peril, and it may be added, that, though the sheriff may know the party has the privilege, it is impossible for him to be certain that the party means to claim it, and unless he does claim it, he is in lawful custody and the judgment satisfied. For these and other reasons stated by the Court in their judgments, given in each of the cases above referred to, it was decided, without any doubt, that under such circumstances no action of trespass lay against the sheriff, and that the only mode of redress was in ancient times by suing out the writ of privilege, and in modern times by summary motion to discharge the prisoner, and we think these reasons extend equally to an action on the case. The ground on which case is contended to be maintainable is, that the allegation, in the declaration, of knowledge on the part of the sheriff, shews that the arrest was malicious, and that a malicious arrest is the proper subject of an action on the case. But the older authorities prove that no such distinction exists. In 1 *Keble*, 220, the case is, "If a witness, coming to testify in a cause in Middlesex is arrested in London, *by one knowing the cause, he hath no remedy* but by habeas corpus, to examine and deliver him thereby; but, if there be any *contempt* by the officer, &c. an attachment may afterwards be awarded against him." "And in no book, as observed by the Court in *Cameron v. Lightfoot* (b), is there any intimation of an action being maintainable for such an arrest, but the question has always been merely the delivery of the party, the process still continuing legal, and capable of being executed at a subsequent time, when privilege does not intervene." And this application of the Court appears

(a) 2 Doug. 671.

(b) 2 W. Bl. 1190.

therefore to provide both for the case where the sheriff innocently and in ignorance of the privilege arrests the witness, and where he maliciously and with knowledge of the privilege makes the arrest; in the one case the Court simply discharging from the custody of the sheriff, in the other, punishing for a contempt; but in both cases considering the privilege as that of the Court, and not as the privilege of the party.

We therefore think the first count discloses no ground of action.

As to the second count or breach, which is also framed in case, being upon a nonfeasance or omission of duty in not discharging the plaintiff, we think the cause of action stated in that count, if the ground of any action, which may be very questionable, is the ground of an action of trespass and false imprisonment, and not of an action on the case. That count states that after the Court of Review had ordered his discharge, and such order was made known to the sheriffs, they still kept and detained him in custody. Admitting that the Court of Review had the power so to do, the further detention of the plaintiff, without the authority of any writ to justify it, became a new trespass and false imprisonment, in the same manner as if there had been a new caption. And if the plaintiff had declared in trespass, and the sheriff justified under the writ, the plaintiff might have now assigned this illegal detainer as the trespass and imprisonment of which he complained.

On the ground therefore that the plaintiff has no cause of action upon the first count, and no ground for an action on the case in the second, we think the judgment of the Court below should be reversed.

Judgment reversed.

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HALSTEAD v. SKELTON (a).

Assumpsit by indorsee against acceptor of a bill of exchange, accepted "payable at C. & Co., bankers, London."

Demurrer on the ground, that as an acceptance payable at a banker's generally, without the restrictive words of stat. 1 & 2 Geo. 4, c. 78, "and not elsewhere," is a general acceptance, and ought to be so declared upon, therefore the declaration, being upon an acceptance payable at a banker's, must be understood to mean an acceptance payable at a banker's and not elsewhere, and was bad for not averring presentment at the banker's.

Held (on error in the Exchequer Chamber,) that such averment was unnecessary, as the effect of such an acceptance as

that declared upon was to make the presentment at the banker's a good presentment, but not to make presentment there necessary, and therefore that the declaration was good.

ERROR from the Court of Queen's Bench.

Assumpsit. The first count of the declaration stated, that one *Harland*, on, &c., made his bill of exchange in writing, and directed the same to defendant, &c., "and the defendant then accepted the said bill, payable at Messrs. *Cunliffe & Co.*, bankers, London:" that *Harland* indorsed to plaintiff, and that defendant "then promised the plaintiff to pay her the said bill, according to the tenor and effect thereof and of the said acceptance and indorsement."

Special demurrer on the ground, that although the bill appeared to have been specially accepted by defendant, and by him made payable at Messrs. *Cunliffe & Co.*, bankers, London, yet it did not appear that the bill was ever presented there according to the terms of the acceptance.

This demurrer, on motion in the Bail Court (b), was set aside as frivolous, and the plaintiff afterwards signed judgment by default.

Error and joinder in error.

Martin for the plaintiff in error (defendant below) (c). The declaration must be taken to state the acceptance according to its legal effect, and, as it states that the defendant accepted the bill "payable at Messrs. *Cunliffe & Co.*, bankers, London," it must be taken the acceptance ran in such a form as to make the bill payable at the place mentioned, and no other, so as to constitute a qualified acceptance within stat. 1 & 2 Geo. 4, c. 78, s. 1. The declaration is bad therefore in substance, for not averring

(a) Decided in Trinity Vacation last (June 29).

(b) See *Skelton v. Halstead*, 2 Dowl. P. C. (N. S.) 69.

(c) June 16th, before *Tindal* C. J., *Coltman*, *Erskine* and *Maule* Js., *Parke* and *Rolfe* Bs.

presentment at the place mentioned; *Rowe v. Young* (a). The first section of the statute enacts: "If any person shall accept a bill of exchange payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill; but, if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be to all intents and purposes a qualified acceptance of such bill, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house, or other place." The statute does not affect the rules of pleading. The same words which in pleading would, before the statute, aver a qualified acceptance, will do so now. The statute merely applies to the form and effect of such acceptance, and says that it shall not be a qualified acceptance, unless the acceptor, in addition to expressing that he accepts the bill payable "at a banker's house or other place," add, "and not otherwise or elsewhere." Since therefore the declaration avers this to be a qualified acceptance, it must be taken that it had the words, "and not otherwise or elsewhere." *Fayle v. Bird* (b), in which this Court decided that where a bill was *drawn* payable in London, and accepted payable there, it was as much a general acceptance under the statute, as if the bill had been rendered there payable by the language of the acceptance only, went entirely upon the authority of *Selby v. Eden* (c). But it is clear that the words "general acceptance" were not very nicely appreciated in *Selby v. Eden* (c): for the unqualified acceptance of a bill required by the drawer to be paid at a particular place, is not "general" quoad place, for the place

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(a) 2 B. & B. 165.

(c) 3 Bing. 611.

(b) 6 B. & C. 531; S. C. 9 D. & R. 639.

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is specified in the drawing, it is merely "general" quoad the absence of any qualification of the terms of the drawing. See *Gibb v. Mather* (a) and *Parks v. Edge* (b). In *Blake v. Beaumont* (c), the bill was accepted generally, and there was a mere memorandum making it payable at Messrs. *Williams, Deacon & Co.*, and *Tindal C. J.* observed in his judgment, "Although there is in the present case a general acceptance of the bill, that will include the place at which the bill is stated to be payable in the count as well as all others, and it does not lie in the mouth of the defendant to say that the bill is not payable at the place specified in the count, when that is the very place which he has pointed out by his acceptance as that at which the instrument will be paid."

Cowling contra. It may be conceded that the bill is set out according to its legal effect. But it does not follow, from the averment, that the bill was accepted payable at *Cunliffe's*, that this was a qualified acceptance so as to render presentment there necessary. For the averment amounts to this and no more, that the bill was payable at *Cunliffe's* if the holder chose to present it there. The proof of a bill "payable at *Cunliffe's*" would support the declaration. In *Blake v. Beaumont* (c), the declaration was on a bill "payable at Messrs. *Williams, Deacon & Co.*," and alleged presentment there. The bill produced bore a general acceptance, with a memorandum making it payable at Messrs. *Williams, Deacon & Co.* It was held that there was no variance, as although the bill was not payable at Messrs. *Williams & Co.* only, yet the acceptance pointed out their house as a place of payment. In *Gibb v. Mather* (a) and *Parks v. Edge* (b) the actions were not against the acceptor.

(a) 2 C. & J. 254.

(b) 1 C. & M. 429.

(c) 1 Dowl. P. C. (N. S.), 697.

Martin in reply. An acceptance making a bill payable at a particular place, without the words "and not elsewhere," is since the statute quite inoperative for the purpose of limiting the place of payment. If therefore a place of payment is mentioned without the words "not elsewhere," it should be stated that the acceptor accepted, without more. It must be taken, therefore, that the words, "payable at Messrs. *Cunliffe & Co.*," allege a qualified acceptance.

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.—This was an action by the indorsee of a bill of exchange against the acceptor. The declaration stated the bill to have been accepted payable at a particular banker's in London, and did not aver any presentment at the house of that banker; and the question argued before us was, whether the omission of such an averment made the declaration bad. The plaintiff in error contended that it did, for that, since the statute 1 & 2 Geo. 4, c. 78, an acceptance payable at a banker's generally, without restrictive words, is a general acceptance, and ought to be so pleaded; whereas by declaring, as in this case, on an acceptance payable at a banker's, the plaintiff must be understood as referring to an acceptance payable at a banker's only, and not elsewhere. And, if the plaintiff in error is right in this proposition, it must certainly follow that the declaration is bad for not averring performance of what, according to his argument, is a condition precedent to any right of action, namely, a presentment at the banker's.

But we are of opinion that the argument of the plaintiff in error cannot be supported.

The statute enacts that, where a bill is accepted payable at a banker's, without further expression in the acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill;

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but the meaning of this enactment is not, that in such a case presentment at the banker's shall be an invalid presentment, but that, in an action against the acceptor, presentment to him shall be good, and consequently that it shall be unnecessary to present, or to aver presentment at the banker's. A bill of exchange drawn generally on a party, may be accepted in three different forms; either generally, or payable at a particular banker's, or payable at a particular banker's and not elsewhere. If the drawee accepts generally, he undertakes to pay the bill at maturity when presented to him for payment. If he accepts payable at a banker's, he undertakes (since the statute) to pay the bill at maturity when presented for payment either to himself or at the banker's. If he accepts payable at a banker's, and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise.

Here the bill was accepted according to the second of these three forms, i. e. payable at a banker's, without any restrictive words; so that presentment at the banker's, (though if made it would have been good presentment) was yet not, as against the acceptor, necessary. Acceding, therefore, as we do, to the argument of the plaintiff in error, that the bill must be taken to have been pleaded according to its legal effect, we do not go along with him in the conclusion at which he arrives. For the reasons which we have given, we do not think that, in this case, the legal effect of the bill as pleaded was to render necessary any presentment at the banker's, and the judgment of the Court below will therefore be affirmed.

Judgment affirmed.



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Thursday,
February 1st.

COLLINS and RIGLEY v. EVANS and WHEELTON, Esqrs

ERROR in the Exchequer Chamber upon the judgment given in *Evans v. Collins* (a).

The declaration in an action on the case, brought by *Evans* and *Wheelton*, Sheriff of Middlesex, against *Collins* and *Rigley*, attornies for one *David Power*, charged them with falsely representing to the plaintiffs that one *John Wright*, who was then in their custody as sheriff, and entitled to his discharge, was another *John Wright*, against whom the defendants, as attornies for the said *David Power*, had sued out a writ of ca. sa., and delivered the same to the plaintiffs, by reason whereof the plaintiffs wrongfully detained the first-mentioned *J. Wright*, and were afterwards obliged to pay him 10*l.* and the costs of an action commenced against them by him for the unlawful detainer.

After the above statement of the delivery of the writ to the plaintiffs, and that the *J. Wright* in their custody was not the same person as the *J. Wright* mentioned in the writ, and that he was entitled to his discharge, the declaration averred that the defendants well knowing the premises, for the purpose of preventing the plaintiffs, as such sheriff, from discharging the last-mentioned *J. Wright*, made the false representation.

The defendants (below) pleaded that at the time they made the representation and declaration they had good and

Case by the plaintiffs as sheriff of Middlesex against the defendants as attornies of one *Power*, for falsely representing to the plaintiffs that one *J. W.*, who was then in their custody as sheriff, and entitled to his discharge, was another *J. W.*, against whom the defendants as attornies for the said *Power* had sued out a writ of ca. sa., and delivered the same to the plaintiffs, by reason whereof the plaintiffs wrongfully detained the first mentioned *J. W.*, and were afterwards obliged to pay 10*l.*, and the costs of an action commenced against them by him for the unlawful detainer. The declaration,

(a) See the case, *ante*, 72.

after stating the delivery of the writ to the plaintiffs, and that the *J. W.* then in their custody was not the same person as the *J. W.* mentioned in the writ, and that he was entitled to his discharge, went on to aver that the defendants, well knowing the premises, and, for the purpose of preventing the plaintiffs from discharging the said *J. W.*, made the false representation.

Held (on error in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench,) that a plea alleging that defendants had reasonable and probable cause to believe and did believe their representation to be true, was an answer to the action.

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probable reason to believe, and did with good faith believe, that the representation was true.

To this the plaintiffs replied *de injuriâ*, &c., on which issue was joined.

The issue was found for the defendants, and the error was brought upon the judgment for the plaintiffs, which the Court of Queen's Bench had given *non obstante* the verdict for the defendants.

The errors assigned were (among others), that the declaration was bad, and the plea sufficient.

Peacock, for the plaintiffs in error (the defendants below(a)). It appears upon the whole record that, although the defendants made a representation which was untrue, yet that they believed it to be true, and had good grounds for believing it to be so. The record, therefore, does not show any cause of action. To give a cause of action the misrepresentation must be fraudulent. The rule is laid down by *Buller, J.* in *Pasley v. Freeman* (b). "Fraud without damage, or damage without fraud, gives no cause of action, but where those two concur the action lies (c)." *Tapp v. Lee* (d) is to the same effect. *Foster v. Charles* (e), *Polhill v. Walter* (f), and *Corbett v. Brown* (g), were followed in *Freeman v. Baker* (h). The only authority on which the liability of the defendants can be put is *Humphrys v. Pratt* (i). The grounds of the judgment in that case are not given, but it was directly alleged in the declaration, that the defendant required the plaintiff to seize the goods in execution, and that the plaintiff did seize at the request and by the direction and at the requisition

(a) The case was argued in last Michaelmas Vacation before *Tindal C. J., Collman, Erskine and Maule Js., and Parke, Alderson, Gurney and Rolfe Bs.*

(b) 3 T. R. 51—56.

(c) *Per Croke J.* 3 Bulst. 95.

(d) 3 B. & P. 367.

(e) 6 Bing. 396; 7 Bing. 105.

(f) 3 B. & Ad. 114.

(g) 8 Bing.

(h) 5 B. & Ad. 797.

(i) 5 Bligh, N. S. 154.

of the defendant, so that the defendant was alleged to have taken such a part as would have made him liable to the owner of the goods in trespass. The case of an auctioneer employed by the defendant to sell goods which did not belong to him (*Adamson v. Jarvis* (a)) is a similar case. In such cases the action may be maintained, because a party for his own *benefit* has required another to do an unlawful act, which the latter does not know to be unlawful, so that an indemnity is implied against the defendant. In this case the defendants did not require the plaintiffs to arrest.

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Erle contra. The representation in this case was not made by a stranger, which distinguishes it from many of the cases cited; and though it cannot be intended, after the decision in *Ramsey v. Eaton* (b), that the sheriff is the execution creditor's agent for all purposes, still there is a manifest responsibility on the part of the sheriff to the execution creditor. *Freeman v. Baker* (c) was a mere case of vendor and purchaser, in which the maxim of caveat emptor was applicable. But where the relation of employer and employed subsists, and a representation is made by the employer, who is likely to have knowledge of the facts, for the purpose of inducing the employed to do a particular act, the employer, if the representation turns out to be untrue, is liable for any damage which may accrue to the employed from his representation. *Adamson v. Jarvis* (d), *Crosse v. Gardner* (e), and *Medina v. Stoughton* (f), are illustrative of this principle. *Humphrys v. Pratt* (g) is not distinguishable. It does not appear that anything turned in that case on the request alleged; nor can any thing turn on the distinction that in that case the goods of the debtor were to be taken, and in this case his body.

(a) 4 Bing. 66, 76.

(b) 10 M. & W. 22.


(c) 5 B. & Ald. 797.

(d) 4 Bing. 65, 76.

(e) Carth. 90.

(f) 1 Salk. 210.

(g) 5 Bligh, N. S. 154.

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The same benefit to the creditor from the seizure is contemplated in either case. [*Tindal* C. J., referred to *Haycraft* v. *Creasy* (a).] In *Polhill* v. *Walter* (b), where the defendant falsely represented that he was authorised by the drawee to accept a bill, the defendant was held liable, though he believed that the drawee would sanction the acceptance. [*Parke* B. There the defendant knew that he had not authority at that time. He did not merely say he should get authority at a future time.] So here the defendant should have asserted his belief, but he asserted his knowledge. He cited also *Fuller* v. *Wilson* (c).

Peacock replied and cited *Shrewsbury* v. *Blount* (d).

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court as follows:—'The question upon this record arises upon the third plea to the declaration, and the issue thereon, which was found for the defendants, the Court of Queen's Bench having given a judgment for the plaintiffs below notwithstanding the verdict found for the defendants on that plea, upon the ground that such plea affords no legal answer to the plaintiffs' action. The declaration alleges that the defendants falsely represented and declared to the plaintiffs, being sheriff of the county of Middlesex, that one *John Wright*, who was then in the lawful custody of the plaintiffs as sheriff of the county of Middlesex, was the same person, *John Wright*, against whom a writ of testatum capias ad satisfaciendum had been issued by the defendants below, whereas, in truth and in fact, he was not the same person but another and different person. The defendants pleaded (thirdly) that they had good and probable reason to believe, and then did with good faith believe, that the said representation and declaration was true, and that the


(a) 2 East, 92.

(b) 3 B. & Ad. 114.

(c) 3 Q. B. 58.

(d) 2 M. & G. 475.

said *J. Wright*, then in the custody of the plaintiffs as such sheriff, was the same person as the other *J. Wright*, against whom the writ of testatum ca. sa. had been issued; which plea was traversed by the plaintiffs, but found by the jury for the defendants below.

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The question, therefore, before us is, whether the defendants, having reason to believe and actually believing a fact to be true, and representing it as such to the plaintiffs, are liable to an action if it turns out in the event that they were mistaken, that is, whether falsehood in a statement without fraud is actionable. It is unnecessary to determine (upon which, however, a question has been made) whether the declaration contains an allegation sufficiently distinct and precise that the defendants did know the statement to be false; for, even if there is such allegation, the finding of the jury on the third plea negatives it, and the question is brought round again precisely to the same point, viz. whether a statement or representation, which is false in fact, but not known so to the party making it, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action.

The current of the authorities from *Pasley v. Freeman* (a) downwards has laid down the general rule of law to be that fraud must concur with the false statement, in order to give a ground of action. In *Pasley v. Freeman* (a) the defendant knew that the statement which he had made was false, and the action was held to be maintainable. In *Haycraft v. Creasy* (b) the defendant made a false representation, but did not know it to be false, on the contrary he believed it to be true, and it was held no action would lie. And in the latter case nothing could be stronger than the terms of asseveration used by the defendant, or more calculated to deceive the plaintiff, namely, that he could positively state the solvency of the party from his own knowledge, and not from hearsay. The three judges,

(a) 3 T. R. 51.

(b) 2 East, 92.

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upon whose authority that case was decided for the defendant, holding that, in the absence of fraud, the assertion amounted to no more than an expression of firm belief and conviction, and not absolute knowledge in the strict sense of that word, and this doctrine has been upheld by many cases of later date, referred to in the argument, and has been contradicted, so far as we are aware, by none.

Unless, therefore, the present case can either be distinguished from those referred to, or can be held to be governed by the direct authority of some decided case bearing on the very point, we think the conclusion must follow, that the plaintiffs are not entitled to recover upon this record.

And we think the circumstance, that the defendants had better means of knowledge than the plaintiffs of the truth of the statement made, which was one ground of distinction relied upon in argument, is not a sound reason for holding the present defendants liable; for such was a fact common to all the cases of action for false representations. The plaintiff in all those cases, being ignorant of the state of his debtor's solvency, makes inquiries of those who have better means of knowledge than himself, and yet in all those cases, if the answer given is honest, though untrue in point of fact, the action has been held not to be sustainable. Neither again can this case be distinguished from the others, on the ground that the defendants had an interest in the representation they made, and that it was information given for their own benefit, for they could have no interest in stating the *J. Wright*, who was then in actual custody, to be the defendant against whom the writ was issued, if he was not so; on the contrary, it would be so far from a benefit to them that it would be an actual injury if the wrong man was detained, as it would give the real defendants in the action the greater opportunity of avoiding the arrest under the writ.

The only question, therefore, is whether the present case is to be governed by the decision of *Humphrys v.*

Pratt(a), which forms the main ground upon which the Court of Queen's Bench have rested their judgment in favour of the plaintiffs below. For, if the decision in that case applies to the facts of the present case, the law to be collected from it, brought as it was before the highest tribunal, must be taken to govern our decision. In that case the declaration stated that the defendant represented and affirmed to the plaintiff (the sheriff) that the judgment debtor was possessed of certain goods and chattels liable to be seized under the writ, which goods and chattels the defendant did then and there cause to be shown to the plaintiff, and then and there required the plaintiff to seize the said goods and chattels under the said execution; and the declaration then proceeds to allege that the plaintiff did afterwards, believing the representation to be true, at the request and by the direction and at the requisition of the said defendant, seize goods and chattels, which were then and there shewn by the defendant to the plaintiffs as and for the goods and chattels liable to be seized under the writ; and concludes by alleging that the defendant then and there deceived and defrauded the plaintiff in this, that the said goods and chattels were not the property of the judgment debtor. Upon this state of the record the House of Lords held that the plaintiff below was entitled to retain his judgment, notwithstanding the declaration did not allege that the defendant below knew his representation to be untrue. No reasons are assigned for the decision, but there is a ground apparent on the face of the declaration which will well support it, without breaking in on the authority of any of the decided cases. The declaration states that the judgment creditor pointed out the goods and required the sheriff to take them. He made the sheriff his mandatory or agent for the purpose of taking the goods, and if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt but he, as any other individual in that position, whether sheriff

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(a) 5 Bligh, N. S. 154.

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or not, may recover over against his master or principal the damages he has been obliged to pay in consequence of obeying such directions. To make that case parallel with the present, it ought to have appeared upon this record that the defendants below had not only represented *J. Wright* to be the real party liable to the arrest, but had required the sheriff to take or to detain him, which is so far from being the case, that the sheriff was left after such representation to his own discretion whether he would act upon it or not. It is obvious that the sheriff by the single inquiry, whether the plaintiff in the action required him to take or detain the individual or not, or by asking whether the plaintiff would indemnify him or not, might have protected himself from any danger ; but not having so done, and the case resting upon a mere representation, untrue in fact, but honestly made, we think, in accordance with the decided cases, that the plaintiffs are not entitled to judgment *non obstante veredicto*, but that such judgment must be reversed and judgment given for the defendants.

Judgment reversed.

END OF HILARY VACATION.

EASTER TERM,

IN

THE SEVENTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
 Lord DENMAN C. J. WILLIAMS J.
 PATTESON J. WIGHTMAN J

In the Bail Court,
 COLERIDGE J.

The QUEEN v. The Mayor, Aldermen and Burgesses
 of GLOUCESTER.

Wednesday,
 April 24.

A RULE nisi had been obtained in the Bail Court before *Pattison J.*, calling on the above parties to shew cause why a mandamus should not go, directing them to pay two sums of 48*l.* 8*s.* and 83*l.* 13*s.* 6*d.* respectively to *Samuel Commendine*, the prosecutor, being sums due to him in respect of expenses incurred in carrying into effect the provisions of 5 & 6 *Will.* 4, c. 76, out of the borough fund.

Fees which a justices' clerk, in a borough, is authorised to take by a table regularly allowed and confirmed under 5 & 6 *Will.* 4, c. 76, s. 124, in respect of charges against persons apprehended and brought before the borough justices by constables appointed by the watch com-

The following were the substantial facts disclosed by the affidavits. *Mr. Commendine*, the prosecutor, was clerk to the justices for the city of Gloucester, regularly appointed according to 5 & 6 *Will.* 4, c. 76, s. 102. This officer was remunerated according to a table of fees confirmed and allowed by the Secretary of State for the Home

mittee, disposed of by such justices, and which fees the clerk to the justices cannot recover from such persons, or other parties, either on account of their not being specifically imposed on them by acts of parliament, or from their inability to pay, are "expenses necessarily incurred in carrying into effect the provisions of the act" under section 92, and a mandamus will go to direct their payment out of the borough fund.

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Department in 1839, according to section 124 of the same act.

There was a watch committee in the borough, appointed according to 5 & 6 Will. 4, c. 76, s. 76. The committee had appointed constables for the borough, and had given them general orders to bring before the justices for the borough all offenders apprehended by them. Mr. *Commendine* regularly attended the meetings of the justices, he made out the commitments, warrants, &c., and supplied the stationery for the purpose of ingrossing them. The fees which Mr. *Commendine* now required to be made up to him out of the borough fund, were of two kinds: 1. Fees charged according to the table, and payable in respect of business done at the instance of the police of the borough, with regard to persons apprehended by them and brought before the justices, and also in respect of informations and other summary proceedings, where these became payable on conviction, &c., under acts of parliament which do not impose the payment of the expenses either on the party convicted or any one else: 2. Where the act of parliament provides for the payment of such expenses, but the parties liable were wholly unable to pay. In both these cases a portion of the expense, the stationery, &c., came out of the pocket of Mr. *Commendine*.

The two sums were claimed in respect of two successive years, the first from the 9th November, 1840, to the 9th November, 1841, being the balance of a gross sum of 117*l.* 16*s.* 6*d.*, after deducting 18*l.* 13*s.* 6*d.*, with which the corporation were credited, as being the amount of penalties and forfeitures recovered summarily before the borough justices, and 54*l.* 15*s.* which the council had paid in respect of the bill. As to this, it appeared that the town council had taken Mr. *Commendine's* claim into consideration, and determined in February, 1842, that the amount should be reduced to this sum. At the same time they made a farther resolution, that they could not recommend the council to sanction any farther payment of fees on summary

convictions arising out of informations by the borough police, until they were satisfied that the ordinary income of the justices' clerk was an insufficient remuneration for the duties of his office. The second sum, 83*l.* 13*s.* 6*d.*, was the balance of a gross sum of 105*l.* 8*s.* for the years 1841, 1842, the only deduction being 21*l.* 9*s.* 6*d.* received for penalties, and credited to the corporation as before mentioned, the watch committee, agreeably to the above specified resolution, having refused to recommend the town council to pay any part of this bill. The ground on which the rule nisi was obtained was, that the expenses here sought to be thrown on the borough fund came within the words of the 5 & 6 *Will.* 4, c. 76, s. 92, by which such fund is to be applied, *inter alia*, in boroughs which have a court of quarter sessions, "towards the expenses of the prosecution, maintenance and punishment of offenders;" and "towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act."

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Chilton and *Francillon* now shewed cause. These fees cannot be called "necessary expenses" within the meaning of this act. The justices' clerk must obtain his payment in the first instance from those on whom the acts of parliament under which proceedings take place have thrown it, from the party convicted, under 18 *Geo.* 3, c. 19, ss. 1 and 2; if not, from the prosecutor; if he can obtain them from neither of these sources, he loses them; that is the risk which he incurs in holding the office. The same risk is undertaken by justices' clerks in counties, where there exists no fund analogous to the borough fund on which it is possible to charge these expenses, and who therefore lose their fees, if they cannot recover them from the parties, though they are entitled to charge them under 26 *Geo.* 2, c. 14, s. 1, in the same manner as clerks in boroughs are by the Municipal Corporation Act. Similar charges were not

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considered within the act in *Reg. v. The Town Council of Stamford* (a), *Reg. v. Thompson* (b), *Reg. v. The Town Council of Lichfield* (c). If these expenses are within the words of section 92, it is nevertheless discretionary with the town council to order their payment, and this court will not interfere; they fall within the words of section 82, as "charges and expenses" which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force. [*Patteson J.* referred to *Reg. v. The Inhabitants of Chelmsford* (d).] This Court also will not order the payment of past expenses, which would render a retrospective rate necessary. *Woods v. Reed* (e).

J. W. Smith contra. The last objection could only be valid on a return to this mandamus; it does not appear that the borough has no funds in hand. The other cases cited are not in point. The ground of the decision in *Reg. v. The Town Council of Lichfield* (c) was, that the expenses of a prosecution, which it was clearly discretionary with the town council to undertake or not, could not be charged on the borough fund, unless there had been a prior resolution authorising it. Here the police were acting under the express directions of the watch committee, given under the authority delegated to them for that purpose, and thus not only labour, but expense, were necessarily thrown on the clerk to the justices. In the *Stamford* case the expenses were incurred in defending, not prosecuting, indictments. In the present case the magistrates have, through the order of the watch committee, a necessary duty thrown on them to perform; they must dispose of the offenders brought before them; they cannot do so without the assistance of their clerk; the clerk's expenses are, therefore, "expenses necessarily incurred in carrying into effect the pro-

(a) 4 Q. B. 900, note.

(d) 3 G. & D. 357.

(b) 5 Q. B. 477; S. C. ante, 497.

(e) 2 M. & W. 777.

(c) 4 Q. B. 893; S. C. ante, 491.

visions of the act" in the strictest sense. By section 124 the council are to settle the table of fees, and it is provided that they may from time to time make a new one; the only reason for their intended interference appears to be, that the legislature contemplated that such fees might become a burden on the borough fund under their control.

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LORD DENMAN C. J.—I think these are expenses "necessarily incurred," and that the council are authorised, when there is no money forthcoming for the payment of fees from the party fined, to pay them out of the borough fund. Under section 78, constables appointed by the watch committee are to apprehend offenders, in order to their being brought before a justice of the peace; here is an express direction, throwing, of necessity, a burden on the justices' clerk. As to the objection that it may become necessary to make a retrospective rate, that can only arise on the return.

PATTESON J.—I am also of opinion that these expenses are properly chargeable to the borough fund. The difficulty on my mind, when the rule was moved for, arose from the peculiar language of section 92. That section directs the application of the borough fund, "in boroughs having a separate court of sessions, towards the expenses of the prosecution, maintenance, and punishment of offenders," (that is apparently of offenders to be tried at the sessions) "and towards such other sum to be paid by such borough to the treasurer of the county as is hereinafter provided," (referring to a provision applicable only to boroughs having such a court) "and towards the maintenance of the borough gaol, &c., and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act." Now, since the former part of these provisions relates to boroughs having courts of quarter

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sessions, it appears at first sight as if the latter part related to such boroughs also; and, if so, it would be strange if these expenses of summary convictions, &c., were comprehended within it, because there would then be a provision for such expenses in the case of boroughs having a quarter sessions, and none in the case of boroughs without a quarter sessions, the rights and duties of the clerks to justices being apparently the same in both. But I think, when the section is more closely examined, the latter words rather appear to be confined to no particular class of boroughs, and, if so, I have no difficulty in regarding these expenses as within them.

WILLIAMS J. and WIGHTMAN J. concurred.

Rule absolute.

Saturday,
April 27.

The QUEEN v. JOSEPH JONATHAN DEIGHTON.

By the 7 Will.
4 & 1 Vict. c.
78, s. 45,
voting papers
for the
election of
aldermen
must contain
the "place of
abode" of the
person voted
for: *Held*,
that this requi-
site was not
satisfied by
papers naming
the house where
the person voted
for carried on
the business of a
book-seller, sleeping
elsewhere.

DECLARATION in quo warranto for usurping the office of alderman in the borough of Cambridge.

The plea stated that *John Deighton* was seised in fee of a house and premises in Trinity Street, in the parish of St. Michael, Cambridge. That by indenture, dated 15th Nov., 1828, *J. Deighton* entered into partnership with the defendant as booksellers for twenty-one years from 1st January, 1829, the business to be carried on at the said house of *J. Deighton* in Trinity Street; *J. Deighton* to require no rent

This defect is not cured by the general provision of 5 & 6 Will. 4, c. 76, s. 142, that no inaccurate description in any voting paper "required by this act" shall hinder the full operation "of this act."

The defendant entered by indenture into partnership with *J. D.*, who was owner in fee of a house within a borough, in which it was agreed that the business of book-selling was to be carried on by them jointly in the house, *J. D.* to require no rent for the parts of the house in which the business was carried on, and the fixtures in those parts to be joint property. The defendant and *J. D.* carried on business in the house, and were jointly rated, the defendant residing elsewhere; *semble*, that the defendant was an "occupier," and entitled to be a burgess within the 5 & 6 Will. 4, c. 76, s. 9.

for the parts of the house in which the business was carried on, and the fixtures in those parts of the house to be the property of the joint trade. That the defendant and *J. Deighton* occupied the house jointly in pursuance of the said agreement, and were jointly rated. That the defendant, before and during 1836, and thence to the 10th May, 1841, was an inhabitant householder within the borough of Cambridge, inhabiting a house in Regent Street, in the parish of St. Benedict in the said borough. That on 10th May, 1841, he went to reside at a house, of which he became tenant, at Harston, within seven miles of the borough of Cambridge, where he resided until and after the 29th September, 1841. That he, the said *J. J. Deighton*, continually, from the time of the passing of the Municipal Corporation Act, had been enrolled a burgess of the said borough, according to the provisions of the said act, and that the words "house, Trinity Street," were successively inserted in the successive lists of burgesses and burgess rolls annually made out for the said borough, as the description from time to time of the nature and situation of the property, in respect of which the name of the said defendant *J. J. Deighton*, was inserted in the said successive lists as aforesaid, and that the said words "House, Trinity Street," in the said lists and rolls respectively meant and intended the said house in the said indenture and lease hereinbefore mentioned; and that the burgess lists were, in each and every of the said years in which his name was so inserted therein, revised according to the provisions of the said statute by the mayor and assessors for the said borough at an open court held in each of the said years for that purpose, and that he, the said *J. J. Deighton*, was not at any time during the whole of that period objected to. The plea then stated that he, the said *J. J. Deighton*, being duly qualified, &c., was before, &c., elected to be an alderman on the 9th of November, 1841.

Replication. That the voting papers personally delivered to the mayor of the said borough, at the said meeting, for

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the said *J. J. Deighton* to be alderman of the said borough (he, the said mayor, then and there being the chairman of and at the said meeting,) did not, nor did the said voting papers of any or either of the said last-mentioned members of the said council, contain the place of abode of the said *J. J. Deighton*, for whom the said last-mentioned members of the said council then and there at the said meeting voted to be such alderman; and that the said voting papers contained an inaccurate and untrue statement of the place of abode of the said *J. J. Deighton* in this, that the place of abode of the said *J. J. Deighton* is in the voting papers stated to be Trinity Street, whereas in truth and in fact the place of abode of the said *J. J. Deighton*, before and at the time of the holding of such meeting, and at the time of the delivery of the said voting papers to the said mayor as aforesaid, and at the time of his being so elected an alderman of the said borough, was at Harston, in the county of Cambridge, and not at Trinity Street or elsewhere than at Harston aforesaid, in the county aforesaid. Verification.

Rejoinder. That in each of the said voting papers, personally delivered to the mayor of the said borough, at the said meeting, by the members of the said council who voted at such meeting for the said *J. J. Deighton* to be an alderman as aforesaid, he, the said *J. J. Deighton*, was described as of Trinity Street, bookseller; and the said *J. J. Deighton* saith, that he was so described in the said voting papers and each of them without any fraud or intention to mislead in him the said *J. J. Deighton*, or any of the members of the council who so voted for him as aforesaid, and that the said description of the said *J. J. Deighton* was, at the time of the said election, and at the time of the delivery of the said voting papers and every of them, such as to be commonly understood, and the same was then commonly understood as the description of the said *J. J. Deighton*, and the same description then and there was such as to be, and the same then and there was, commonly understood by and

amongst the then members of the said council, and the then burgesses of the said borough, and other the persons interested in the said election, and the said *J. J. Deighton* was then and there perfectly well known by the said description, and as well known by the members of the said council, and the said burgesses and the said other persons, as if he had been then and there described, or as if his place of abode had been mentioned and set forth in the said voting papers, or any of them, in any other manner than as above is mentioned.

General demurrer and joinder.

The case was argued this term (*a*) by

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Gunning for the crown. The election of aldermen is thus provided for by 7 *Will.* 4 and 1 *Vict.* c. 78, s. 14:—Every member of the council entitled to vote in that election “may vote for any number of persons, not exceeding the number of aldermen then to be chosen, by personally delivering at such meeting to the mayor or chairman of the meeting a voting paper, containing the christian name and surname of the persons for whom he votes, with their *respective places of abode and descriptions*, such paper being previously signed with the name of the member of council voting.” Here, the “place of abode” of the defendant was not truly stated in the voting papers, but, instead of it, those papers contained the description of his place of business in Trinity Street, where he carried on the bookselling trade, but never resided. The answer in the rejoinder, that there was no fraud or intention to mislead, is beside the purpose; the simple question is, whether the specific directions of an act of parliament have been complied with. It is true that there is a provision in the 5 & 6 *Will.* 4, c. 76, s. 142, that “no misnomer or inaccurate description of any person, body corporate or place named in any schedule to this act annexed, or in any roll, list, notice or voting paper required by *this act*, shall hinder the full operation of this act;” but there is no similar pro-

(a) April 24, before Lord Denman C. J., *Patteson, Williams* and *Wightman* Js.

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vision in 7 *Will.* 4 and 1 *Vict.* c. 78, nor can the provision of the former statute be extended by implication to the latter. The presumption rather is that it was designedly omitted: *Moses v. Newman* (a).

Byles, Serjt. contrd. The description is sufficiently accurate. The terms "place of abode" or of "residence" do not necessarily imply the house in which a party sleeps. His "place of abode" may be said with equal or at least sufficient propriety to be where he carries on his ordinary business. But, even if this were otherwise, it does not follow that an election is invalidated by so slight a mistake. And the 5 & 6 *Will.* 4, c. 76, s. 142, applies, for the election of aldermen is a proceeding under that act; both acts must be taken together. The election of aldermen is provided for by the former act, sect. 25; the latter only adds certain particulars as to the mode of election.

Gunning in reply. The same heading "place of abode" is found in schedules 3 and 6 of 2 *Will.* 4, c. 45, where it clearly means something different from place of business, and has been uniformly so held.

Cur. adv. vult.

The judgment of the Court was now delivered by Lord DENMAN C. J.—We are of opinion that the election of *J. J. Deighton* to the office of alderman of the borough of Cambridge is not a good election. We think that the description of his residence in all the voting papers is not a true description, and that it is not cured by anything in the act of parliament. It is unnecessary, therefore, to consider any of the other points.

Judgment for the Crown (b).

(a) 6 Bing. 556.

points were raised and argued:—

(b) The following additional Whether the meeting at which the

election in question took place was illegal and void, on the ground that no "notice of the time and place of such meeting was given three clear days before the meeting," nor any "summons to attend the council, specifying the business proposed to be transacted at such meeting," left at the usual abode of any member of the council three clear days before the meeting, as required by 5 & 6 Will. 4, c. 76, s. 69, it being contended on the part of the defendant, that as the election took place at one of the quarterly meetings for the transaction of general business mentioned in the same section, no such notice or summons was necessary, and that, at all events, the want of them did not invalidate the election. But as the Court gave no

opinion on these points, the part of the pleadings and arguments relating to them is omitted.

It was also contended, on the part of the crown, that the occupation of the premises in Trinity Street by Mr. J. J. Deighton, as shown in the plea, was not sufficient within the meaning of 5 & 6 Will. 4, c. 76, s. 9; that the lease passed no right to the soil to the defendant, but simply an easement or permission from the owner to carry on a particular trade on the premises, and *Rex v. The Company of Proprietors of the Mersey and Irwell Navigation*, 9 B. & C. 95; S. C. 1 Man. & Ryl. 84, was cited. But on this point counsel for the defendant was stopped by the Court.

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The QUEEN, on the prosecution of ROBERT BULLOCK, v.
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KELLY, in Hilary Term last, obtained a rule calling on the defendant, surveyor of the highways within the parish of Chipping Barnet, in the county of Hertford, to shew cause why a mandamus should not issue commanding him to pay to *Robert Bullock*, the prosecutor of an indictment against the inhabitants of the said parish for non repair of a highway, or to his attorney, the costs of the prosecution.

In November, 1840, at a special sessions for the highways, the justices of the liberty of St. Alban's, Hertfordshire, ordered that the said *Bullock* should prefer a bill of indictment, under stat. 5 & 6 Will. 4, c. 95, at the then next Hertfordshire Assizes, against the inhabitants of the parish of Chipping Barnet, in the said liberty, for non repair of a

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Where a judge of assize, after trial of an indictment for non repair of a road under stat. 5 & 6 Will. 4, c. 50, s. 95, makes an order that the costs be paid by the parish, but does not insert the amount of costs in the order, nor ascertain and fix the amount either then or at any subsequent time,

this Court will not enforce such an order by a mandamus.

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highway. The bill was preferred accordingly and found a true bill, and the case was tried before *Gurney* B. at the Hertfordshire Spring Assizes, 1842, when a verdict of guilty was returned. The learned judge respited the judgment and recognizances until the following summer assizes, and made an order for costs, which was thus entered by the clerk of assize and signed by the learned judge, "The inhabitants of the parish of Chipping Barnet for non repair of a road. It is ordered by Mr. Baron *Gurney* that the costs of this prosecution be paid out of the rate made and levied, or to be made and levied, in pursuance of the 5 & 6 *Will.* 4, c. 50, in the said parish of Chipping Barnet." At the following summer assizes the judgment and recognizances were again respited until the spring assizes for 1843. After the summer assizes for 1842, application was made to the taxing masters of the Crown Office, and to the deputy clerk of assize for the Home Circuit, to tax the costs, all of whom declined to do so, considering that they had no authority in the matter. In October, 1842, *Gurney* B. was applied to to ascertain the amount of costs, and to insert the same in his order. The learned judge declined to do so. At the spring assizes, 1843, the prosecutor appeared before *Patteson* J. in the Crown Court, and did not apply for judgment, as the road had then been repaired, but applied for the costs. The learned judge, after consultation with Lord *Denman* C. J., the other judge of assize, dismissed the application, and respited the judgment to the next summer assizes. At the last mentioned assizes application was made to *Parke* B. in the Crown Court for judgment and also for the costs. The learned judge imposed a nominal fine on the inhabitants, discharged the recognizances, and dismissed the application for costs. The costs were subsequently taxed at 320*l.* by the clerk of the peace for the county at the request of the prosecutor. The amount had been demanded of the defendant, who was then surveyor, but was not so when the bill was preferred or when the indictment was tried.

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Platt and *Godson* now shewed cause. This Court has no power to interfere by mandamus to enforce payment of the costs in question, for the learned judge who ordered the payment did not state the amount in his order. This application is made under section 95 of stat. 5 & 6 Will. 4, c. 50, which, after enacting that an indictment for non repair of a highway may be directed by justices to be preferred either at the quarter sessions or at the assizes, goes on to provide "that the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this act, in the parish in which such highway shall be situate." In *Sellwood v. Mount* (a) it was decided that under the 90th section, which allows costs to be awarded on appeals against an order for stopping up a highway, an order of sessions omitting to insert the amount of costs could not be enforced; and this authority was acted upon in *Reg. v. Long* (b) with respect to the costs of an appeal at the borough sessions against the order of removal, although the amount had been submitted to the recorder after the termination of the sessions and approved by him. In the present case, after the termination of the assizes, the judge was functus officio, and neither he nor any one else could ascertain the amount of costs. [*Patterson J.* Suppose it had been the last case at the assizes?] The bill of costs should have been ready at the time of trial.

Kelly and *Bramwell* contra, The terms of the statute do not authorise the judge to do more than make a general order for costs. Under stat. 7 Geo. 4, c. 64, s. 22, it is expressly enacted that the costs on prosecutions for felonies shall be ascertained "by the proper officer of the Court." Under the Highway Act, which contains no such express provision, no officer can be authorised to tax the costs;

(a) 1 Q. B. 726; S. C. 1 G. & D. 358.

(b) 1 Q. B. 740; S. C. 1 G. & D. 367.

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and, as it would be absurd to suppose it any part of the judge's duty to tax them, the *law* must ascertain the amount under a general order for payment. In section 90 of the Highway Act, it is enacted that the "Court shall award the costs," which distinguishes *Sellwood v. Mount* (a) from the present case. So under section 82 of stat. 4 & 5 Will. 4, c. 76, under which *Reg. v. Long* (b) was decided, it is for the "Court" to order costs. Now a Court has an officer who may be employed to tax costs, but a "judge of assize" as such has no officer, and in this case the judge did not act as a Court, but rather like a judge giving a certificate as to the amount of damages for the purpose of carrying costs. In this case the judge in effect could do no more than certify that the prosecutor was entitled to costs. These costs are no consequence of a judgment, but are collateral. [*Patteson J.* If the order is good, why not indict for the non payment? That was held in *Rex v. The Treasurer of the County of Surrey* (c) to be the proper remedy against the treasurer of a county who refused to pay the expenses of a witness in a case of felony.] In *Rex v. The Saint Katherine Dock Company* (d) a mandamus went to enforce, inter alia, payment of an unascertained amount of costs. The Court will allow a mandamus where it is the most convenient remedy; *Rex v. The Severn and Wye Railway Company* (e), and *Reg. v. The Bristol Dock Company* (f).

Lord DENMAN C. J.—This is a case which places the Court in some difficulty. A parish has been indicted for non repair of a road, and has been found guilty. Undoubtedly the statute meant that in such a case the parish should pay costs. The only question in this case is,

(a) 1 Q. B. 796; S. C. 1 G. & D. 358.

(b) 1 Q. B. 740; S. C. 1 G. & D. 367.

(c) 1 Chit. 650.

(d) 4 B. & Ad. 360; S. C. 1 N. & M. 121.

(e) 2 B. & Ald. 646.

(f) 2 Q. B. 64; S. C. 1 G. & D. 286.

whether the manner in which the parish is called on to pay is the proper manner. The 95th section enacts "that the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried." I think this must mean either that the amount of costs shall be ascertained by the judge himself, or that, if he makes his direction in general terms, the costs shall be put in the usual course of taxation by the proper officer. There was a proper officer in Court for that purpose. I do not enter into the question whether the judge on this occasion was a Court of Oyer and Terminer. The judge did not ascertain the amount of costs, nor did he put the officer in motion to ascertain them. We are now called upon to order the payment of costs not ascertained, but of costs generally, so that they would remain to be ascertained after the issuing of our writ. It appears to me that we cannot call upon the surveyor to obey before he knows the amount of costs. I do not inquire how far the change of parties might influence us, if it were a matter of discretion with us to issue or withhold the writ prayed for. If the learned judge who tried the case has now the power of ascertaining the costs he may be called on to act; if he has not, the case must fall to the ground. When costs are spoken of in a court of justice, they are not such costs as may be ascertained aliunde, but such costs as the judge may apply his mind to and ascertain. If, as the prosecutor contended, the judge exercised a merely collateral power in directing costs, and can fix the amount afterwards, the prosecutor may apply to him now; but we cannot interfere.

PATTESON J.—Assuming that mandamus is the proper remedy in this case, as to which I am not clear, even if the amount of costs had been ascertained, we are called upon to issue a mandamus, either to compel payment of an unascertained sum or to ascertain it ourselves. It is quite plain, when the legislature says that the judge shall direct costs

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to be paid, that it must mean that the judge should superintend the inquiry and ascertain the amount, either by himself or by his officer. Whether it was intended that this should be done at the time or at any future time, it was at all events intended that it should be done under the direction of the judge, and not under the direction of this Court. We cannot issue a mandamus for an unascertained amount of costs.

WILLIAMS J.—Undoubtedly this is a case in which the costs ought to be paid. I have considered whether there has been any omission on the part of the applicant, and I think there has. For, suppose the judge to have made a valid order for costs, it does not appear that the applicant required the officer to tax them before the commission expired. If the clerk of assize had been applied to for that purpose and refused, it would have been just as hopeful to have applied for a mandamus against him as to have applied for this mandamus. How can a mandamus go for an unascertained sum? That is a decisive objection.

WIGHTMAN J.—I come to the same conclusion with great reluctance, for it is clear the parish ought to pay these costs. But, if the mandamus issue, it would direct payment generally. How then could it be obeyed? Suppose a peremptory mandamus to issue, would it be for such amount as the prosecutor chooses to demand? I think there would be insuperable difficulty in giving effect to the writ.

Rule discharged.



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Tuesday,  
April 30th.

## The QUEEN v. TORDOFT.

**ISAAC TORDOFT**, being in the custody of the keeper of the house of correction at Wakefield, in the west riding of the county of York, a writ of habeas corpus was obtained to bring up the body, with cause, &c. The keeper returned that the prisoner was detained under the following warrant.

West Riding }  
of Yorkshire, }  
to wit. }

To *George Kershaw*, the constable of Barnsley, in the West Riding of the county of York, and to the keeper of the house of correction at Wakefield, in the said West Riding of the county of York.

Whereas information and complaint hath been made before me, *William Bennet Martin*, Esq., one of her Majesty's justices of the peace in and for the West Riding of the county of York, by *Andrew Faulds*, of Worsbrough, in the said West Riding, colliery proprietor, upon the oath of the said *Andrew Faulds*, against *Isaac Tordoft*, late of Stainbrough, in the said West Riding, collier, for that he the said *Isaac Tordoft*, contracted with the said *Andrew Faulds* and others, his partners in trade, as colliery proprietors, to wit, on the 1st day of January, in the year of our Lord 1842, in the West Riding aforesaid, to serve them the said *Andrew Faulds* and others in the said capacity and employment of a collier in the said West Riding from thence until the end of one month after he should have given to or received from his said masters notice to quit and leave his said masters' service, and that the said *Isaac Tordoft*, in pursuance of the said contract, entered into the service of the said *Andrew Faulds* and others accordingly, and that afterwards he did unlawfully absent himself from his said service without his said masters' consent, in the Riding aforesaid, to wit, on the 23rd, 24th, 26th, and the 27th days of February last past respectively, before the time of his said contract was com-

In a commitment in execution, under stat. 4 Geo. 4, c. 34, s. 3, which is intended by the statute to operate as a conviction, the warrant must shew that the magistrate has done all that is necessary to make the conviction lawful. Therefore where it did not sufficiently appear, on the face of the warrant of commitment, that the witnesses in support of the charge had been examined in the prisoner's presence: — *Held*, that he was entitled to his discharge.

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pleted, to wit, after the commencement of the said contract, and before the end of one month after he had given notice to or received from his said masters notice to quit and leave his said masters' service, and hath from thence hitherto neglected to fulfil his said contract, against the form of the statutes in such case made and provided. And whereas the said *Isaac Tordoft*, in pursuance of my warrant for that purpose, hath this day appeared before me to answer the said complaint, but hath not proved that he is not guilty of the said complaint and charge, and whereas, in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations upon oath of both the said parties touching the matter of the said complaint, and upon due consideration had thereof have adjudged and determined the said complaint to be true, and that he the said *Isaac Tordoft* did contract with the said *Andrew Faulds* and others to serve them the said *Andrew Faulds* and others as aforesaid, in the Riding aforesaid, and did afterwards absent himself from the said service before the time of his said contract was completed as aforesaid, to wit, on the several days aforesaid in the year aforesaid, and I do therefore convict him the said *Isaac Tordoft* of the said offence, in pursuance of the statutes in that case made and provided :

These are therefore to command you, the said *George Kershaw*, forthwith to convey the said *Isaac Tordoft* to the said house of correction at Wakefield aforesaid, and to deliver him to the keeper thereof, together with this warrant. And I do hereby command you the said keeper to receive the said *Isaac Tordoft* into your custody in the said house of correction, there to remain and be held to hard labour for the space of three months from the date hereof, and for your so doing this shall be your sufficient warrant. And whereas it having appeared to me, upon the proofs and allegations of both the said parties upon oath as aforesaid, that no wages are now or will hereafter become due to the said *Isaac Tordoft* from the said *Andrew Faulds* and others

during the period that the said *Isaac Tordoff* will be confined in the said house of correction as aforesaid, I have adjudged and determined that no wages are now or will hereafter become due to the said *Isaac Tordoff* from the said *Andrew Faulds* and others during the said period that the said *Isaac Tordoff* will be confined in the said house of correction aforesaid, I have not made, and I do not make any order to abate a proportionable part of his wages for and during such period as he shall be confined in the house of correction as aforesaid.

Given under my hand and seal, at the court house in Barnsley, in the said West Riding of the county of York, the 6th day of March, in the year of our Lord, 1844.

*W. Bennet Martin* (L. s.)

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*Bodkin* now moved that the prisoner might be discharged. The warrant of commitment is founded on stat. 4 Geo. 4, c. 34, s. 3, which enacts, that if any collier shall contract with any person to serve him for any time or times whatsoever, or in any other manner, and having entered into such service shall absent himself from his service before the time of his contract shall be completed, it shall be lawful for any justice of the peace for the county or place where he shall have so contracted, or be employed, or be found, upon complaint thereof made to him upon oath, to issue a warrant for his apprehension, and to examine into the nature of the complaint, and if it shall appear to such justice that any collier shall not have fulfilled such contract, to commit him to the house of correction, there to be held to hard labour for not exceeding three calendar months. The instrument returned does not recite a conviction, but is a conviction and warrant of commitment in execution at the same time. It must therefore be construed with the same strictness as a conviction, and must not only shew the jurisdiction of the justices on the face of it, but also that the prisoner has been legally convicted of the offence charged, the commitment being in-

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tended by the act to operate as a conviction; *Rex v. Staffordshire Justices(u)*, *Ex parte Johnson(b)*, *Johnson v. Reid(c)*, and *Reg. v. Lewis(d)*. He then proceeded to take several objections to the warrant of commitment, but the only one upon which the Court pronounced any opinion was the following, viz. that it does not appear from the whole document that the prisoner was present when the witnesses against him were examined. After reciting the information and complaint, the commitment goes on to state, "and whereas the said *Isaac Tordoft* hath, in pursuance of my warrant for that purpose, this day appeared before me to answer the said complaint, but hath not proved that he is not guilty of the complaint and charge; and whereas, in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations upon oath of the said parties touching the matter of the said complaint, and upon due consideration had thereof, have adjudged the same to be true." This is quite consistent with the complaint on oath having been heard, and the witnesses in support of it examined in the absence of the prisoner on one day, and his case being afterwards gone into on his appearance on a subsequent day. It cannot be inferred from the mere averment that the prisoner hath this day appeared, and hath not proved that he is not guilty of the charge, that the witnesses were examined on that occasion in his presence, and it is consistent with the justice having examined the proofs and allegations on both sides, that he had heard them at different times, that of the one party upon the information, and that of the other upon his appearance.

*Fry* and *Huddleston*, on the same side, were stopped by the Court.

*Erle*, *E. Yardley* and *Overend*, contra. It is conceded

(a) 12 East, 572.  
 (b) 7 Dow. 702.

(c) 6 M. & W. 124.  
 (d) 13 L. J. N. S. M. C. 46.

that this commitment is intended to operate as a conviction, and that it does not require any conviction to support it. If then a want of jurisdiction had appeared on the face of the instrument, it would have been clearly bad. But it differs essentially from a conviction, and it is sufficient to its validity that the requisitions of the act have been substantially complied with, and that the jurisdiction of the justices appears on the face of the warrant. Now the act only requires an information upon oath, a warrant to apprehend the party charged, and an examination by the justice into the subject-matter of the complaint. All this is stated in the body of the instrument. But if it is to be considered as a conviction, then the evidence also ought to be set out. This however has never been considered necessary in warrants of this sort; see the precedent in *Chitty's Burn's Justice*, vol. 5, p. 934, *Paley on Convictions*, p. 236. The Court will not construe them with the same strictness as convictions. [*Patteson J.* It has never been held that there is any difference between a warrant of commitment of this sort and a conviction.] But it is sufficiently plain from the terms of the warrant that the whole of the proceedings took place on the same day; it will therefore be intended that the prisoner was present when the witnesses in support of the charge were examined. The statement is in effect "the said *Isaac Tordoft* hath this day appeared. I have examined the proofs and allegations upon oath of both the said parties. I do convict." It will therefore be presumed in this case that the evidence was given in the presence of the prisoner, unless the contrary appear. *Rex v. Baker*(a), *Rex v. Aikin*(b), *Rex v. Kempson*(c), *Rex v. Thompson*(d), *Rex v. Swallow*(e). Where it appears that the whole of the proceedings were not on the same day, or it is manifest that the evidence was not given in the presence of the prisoner, the conviction is bad,

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(a) 2 Str. 1240.

(d) 2 T. R. 18.

(b) 3 Burr. 1785.

(e) 8 T. R. 284.

(c) 1 Cowp. 241.



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*Rex v. Vipont* (a). But that it is not so here. The cases are all collected in *Paley on Convictions*, p. 143, edition of 1838, and the result of them is, that where all the proceedings have taken place in one day, and nothing appears on the face of the conviction to contradict the intendment, it will be presumed that the evidence was given in the prisoner's presence (b).

*Cur. adv. vult.*

Lord DENMAN C. J., on a subsequent day delivered the judgment of the Court.—The Court desired time to consider one of the objections preferred against the warrant of commitment under which the applicant was imprisoned.

His offence appears to have been "absenting himself from the service for which he had contracted," under 4 Geo. 4, c. 34, an offence of which it seems a party may be duly convicted on the face of the instrument itself, which consigns him to imprisonment: *Johnson v. Reid* (c). It is however necessary to the validity of that course of proceeding, that the warrant of commitment should show that the magistrate has done all that is necessary to make the conviction lawful.

For the prisoner it was contended that that cannot be, unless the witnesses against him appear to have been examined in his presence. In this principle we fully concur; the learned counsel for the crown did not dispute it, but argued that the witnesses against the prisoner do sufficiently appear by the warrant to have been examined in his presence, relying on the case of *Rex v. Baker* (d), and on numerous decisions which have followed it (e).

We have examined those cases, which afford an example of the inconvenience of departing from those rules of pro-

(a) 2 Burr. 1164.

(b) But see the case of *R. v. Selway*, 2 Chit. 522. All the cases referred to were prior to the 3 Geo. 4, c. 23. The general form of convictions given by that statute prescribes an allegation that the evi-

dence was given in the presence of the prisoner.

(c) 6 M. & W. 124.

(d) 2 Stra. 124.

(e) See *R. v. Selway*, 2 Chit. 522.

cedure which are founded on the principles of universal justice. No possible mischief, except the escape of one offender for a single defective conviction, could have arisen from requiring a plain statement in all summary convictions that the witnesses were examined in the prisoner's presence. It is remarkable that the statute(a), which gives the most general form, requires this statement to be expressly made. But equivalents have been admitted, though with regret, by so many learned judges, that the Court is compelled to take the trouble of sifting the details of each conviction, to discover whether some words there do not import that essential fact. On minutely looking at the language of the commitment before us, we do not find that fact, but infer the contrary.

A complaint was previously made on oath against the prisoner; he was then summoned, and "did not prove himself not guilty of the said complaint and charge," according to the statement of the magistrate, who adds, "in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations upon oath of both parties touching the matter of the said complaint, and upon due consideration had thereof" have adjudged and determined the said complaint to be true.

As the information on oath was previously before the magistrate, who states that he required the prisoner to answer it by proof that he was not guilty, we think the natural construction is that no other allegation or proof was brought against the prisoner. Consistently with the recitals, no *vivâ voce* evidence may have been adduced against him. But if there were, nothing was urged as showing that it was given in his presence, except the order of time in which the proceedings are set forth in the document. We are clearly of opinion that none of the cases decided would justify us in making that presumption. We cannot at all accede to the argument that this commitment is a distinct act from the conviction, which ought to be presumed good, though neither returned nor recited. If

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(a) 3 Geo. 4, c. 23, s. 1.

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there was such a conviction in fact, it ought to have been drawn up in a proper form. But the warrant of commitment is alone before us; we think it insufficient, and the prisoner is entitled to be discharged. We say nothing on the other grounds of objection.

Prisoner discharged.



HASLEHAM v. SAMUEL YOUNG and WILLIAM SAMUEL YOUNG.

Monday,  
 April 15.

One of a firm of attornies has no general authority to bind the firm by a guarantee given to pay debt and costs, in consideration of the plaintiff discharging his debtor out of custody.

**ASSUMPSIT.** The first count of the declaration stated that before the promise, &c., one *Dick* was lawfully in custody under a ca. sa. at the suit of the plaintiff, and that in consideration that the plaintiff at the request of the defendants would give *Dick* his discharge, the defendants, by a certain memorandum in writing, then agreed to pay to the plaintiff or his attorney, &c., on, &c., 99*l.* 11*s.*, with interest, &c. That plaintiff did discharge *Dick*. Breach, non-payment by defendants after default by *Dick*.

Second count, on an account stated.

Plea, non assumpsit, and issue thereon.

On the trial before Lord *Denman* C. J., at the London Sittings after Easter Term, 1843, it appeared that the defendants were father and son, and in partnership as attornies. A memorandum in the terms stated in the declaration was put in evidence. The memorandum was signed by the son, "*Young & Son*," which words had been followed by the words, "defendant's attornies," but the son afterwards erased them. It appeared that the son had been employed by *Dick* to settle with the plaintiff, and had procured his discharge in the manner stated in the declaration. It did not, however, appear whether the son in this matter acted on behalf of the firm, or had the authority of the father for giving the guarantee. His Lordship directed a verdict for the plaintiff, and reserved leave to the defendants to move to enter a nonsuit.

*Petersdorf* in the following Trinity Term obtained a

rule accordingly, after citing *Hedley v. Bainbridge* (a), in which it was decided that one partner of a firm of attorneys has no authority to make a promissory note in the name of a firm, though it be made for money delivered to him in the course of business, to be invested by the firm on mortgage, and *Duncan v. Lowndes* (b), in which it was decided that the general partnership authority does not empower merchants to bind each other by a guarantee.

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*Pearson* now shewed cause. *Hedley v. Bainbridge* (a) is distinguishable, for a negotiable instrument given by one partner constitutes a contract with any person whatever to whom the instrument may be passed, and this distinction appears to have been present to the mind of *Alderson B.* in *Levy v. Pyne* (c), and in *Duncan v. Lowndes* (b) the guarantee did not appear to relate to business done by the firm, whereas in this case the adjustment of *Dick's* affairs, and the procurement of his release, were obviously matters within the province of the defendants as attorneys.

*Petersdorff* contra. In *Sandilands v. Marsh* (d) a guarantee given by a navy agent was held to be binding on the firm; but there the guarantee was shewn to relate to a partnership transaction, and had been adopted by the other partner after it had been given. Here it does not appear that the father knew that the guarantee had been given. (He was then stopped.)

LORD DENMAN C. J.—The case is quite clear. The guarantee was not given in the usual course of business. Even if the father had been attorney for *Dick*, he would not be bound by the undertaking, unless some evidence had been given to connect him with it.

PATTESON J.—There was no evidence to shew that the

(a) 3 Q. B. 316; S. C. 2 G. & D. 483.

(b) 3 Campb. 478.

(c) Car. & M. 453.

(d) 2 B. & Ald. 673.

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guarantee was given according to any usual practice of the defendants, and it certainly was not according to the usual practice of attorneys generally.

WIGHTMAN J. concurred.

Rule absolute.

Saturday,  
 April 27th.

The QUEEN v. The Inhabitants of CATTERAL.

Where the complaint on which a pauper is removed is made by an assistant overseer, *quære*, whether on appeal against the order of removal, the sessions should receive evidence to shew that the complaint was properly authorised.

An examination stated, "the pauper came to live with my father as farm servant, he was not engaged for any particular time; but my father found him board, washing, lodging and clothes, for so long a time as he stayed. The pauper continued in my father's service

in that manner, without leaving, for more than two years, during all which time he lived and slept on my father's farm. There never was any other agreement come to whilst I lived at home, but my father found the pauper with board, washing, clothing and lodging, during the said service."

*Held* bad, as it did not shew any hiring whatever.

ON appeal to the Lancashire Quarter Sessions against an order for the removal of *William Nuttal* and child from the township of Catteral to the township of Dutton, both in the said county, the sessions quashed the order, subject to the opinion of this Court upon a case.

The case set out (among other things) the complaint as follows: "Lancashire to wit. The information and complaint of *Richard Raby*, the assistant overseer of the poor of the township of Catteral in the said county, taken upon oath before us, &c., who saith, that *W. Nuttal* and *Mary Ann*, aged about fifteen months, his child, have come to inhabit in the said township of Catteral, &c., and that they are poor and actually chargeable to the said township of Catteral, and that he is informed and believes their last legal settlement is in the township of Dutton, in the said county, to which place he desires an order to remove them."

*William Bowin* stated, "I am a farmer in the township of Dilworth in this county, and reside at a farm called Written Stone. I was married in December, 1833. I lived at home with my father about a year and a half after my marriage, when I went to live at the farm I now reside at. My father's name is also *William Bowin*, and he lives at a farm at Dutton, in this county, called Gudgeons, which he has lived upon for upwards of thirty years. Better


than two years before I was married, the pauper, *W. Nuttal*, came to live with my father as a farm servant; he was not engaged for any particular time, but my father found him in board, washing, lodging and clothes for so long a time as he stayed. The pauper, *W. Nuttal*, continued in my father's service in that manner, without leaving, from the two years before I was married, until after I left home to live at Written Stone Farm; during all which time he lived and slept in my father's farm in Dutton; and during all which time he was a bachelor. There never was any other agreement come to whilst I lived at home; but my father found the pauper, *W. Nuttal*, with board, washing, clothing and lodging, during the said service."

The examination of the pauper, *W. Nuttall*, stated, "Better than two years before the witness, *W. Bowin*, was married, I went to his father's, *W. Bowin*, of Dutton Farm, as a farm servant. There was no agreement as to the length of any service, but I was found with board, lodging, clothing and washing whilst I stayed. I continued in the service from the commencement of the time I went until the witness, *W. Bowin*, left home to live at Written Stone, being altogether upwards of three years and a half, during all which time my said master, *W. Bowin*, found me board, lodging, clothing and washing. I slept at his farm, &c."

The principal grounds of appeal were, "1. That the order is void, and was made without any complaint of or by the parties who by law are authorised and required to make such complaint; 2. That the examinations, on which the said order of removal was made, were not and are not in law sufficient to justify the making of the said order; 3. That the examinations are bad upon the face of them, and do not state the necessary facts from which it can, or may, or ought to be implied that the said *W. Nuttal* did gain a settlement by hiring and service as in the said examination pretended; 4. That the examinations do not state or sufficiently shew that, at the time of the alleged hiring and service, the said *W. Nuttal* was an unmarried person not having a child or children, as by law required."

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When the appeal came on to be heard, the respondents offered to produce evidence in support of their order, but the appellants objected that the complaint and examination, or one of them, were or was insufficient, so that the order was incapable of being supported by any evidence. The sessions, after argument and without hearing the evidence, offered to set aside the order of removal for the insufficiency of the examinations, and subject to the opinion of this Court as to the sufficiency of the complaint and examinations.

If the Court should be of opinion that the objections taken by the grounds of appeal, or any or either of them, ought to have prevailed, then the order of sessions setting aside the order of removal to be confirmed. If the Court should be of the contrary opinion, then the order of sessions to be quashed, and the order of removal confirmed.

*Whigham* in support of the order of sessions. The complaint by the assistant overseer was insufficient. He referred to stat. 13 & 14 Car. 2, c. 12, s. 1, and stat. 59 Geo. 3, c. 12, s. 7, and to *Bennet v. Edwards* (a). The Court then called on

*Cowling* upon this point. In *Rex v. Bedingham* (b) the complaint was by a single overseer, and it was held sufficient, because it had in fact been made with the consent of the other overseers and on their behalf. Again, it might have been one of the assigned duties of the assistant overseer, under stat. 59 Geo. 3, to make such a complaint. All this might have appeared, if the sessions had not rejected the evidence offered. The appellants could not have been prejudiced, for the respondents had adopted the complaint, so that it would have concluded them; *Reg v. Leominster* (c).

(a) 7 B. & C. 586; S. C. 1 M. & R. 582.

(b) 5 Q. B. 653; S. C. ante, 98.

(c) 5 Q. B. 640.

*Whigham* as to the other point. The evidence does not shew any hiring whatever. In *Rex v. Wincaunton* (a), and cases of the same class, where a hiring for a year has been inferred, there has been proof of some hiring. The present case is precisely like *Rex v. Christ's Parish in York* (b); the pauper might have left at any time.

The Court then called upon,

*Cowling* contra. The words in the examination, "There was never any other agreement come to," shew there was some hiring. A general hiring is a hiring for a year; *Rex v. Stockbridge* (c).

LORD DENMAN C. J.—No obligation of any sort is stated here; there is no hiring whatever. The inference of a hiring for a year from a general hiring is a very different matter.

PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

Order of Sessions confirmed.

(a) Bur. S. C. 299.

(c) Bur. S. C. 759.

(b) 3 B. & C. 459; S. C. 5 D. & R. 314.

MARY EVANS v. GWYN, Clerk.

**PROHIBITION.** The declaration stated that in October, 1842, a citation was issued from the Consistory Court of the diocese of St. David's, holden at Carmarthen, citing the said *Evans* to answer the said *Gwyn* in a cause of defamation and slander; that *Evans* appeared, and *Gwyn*

which an action would lie, and other imputations forming matter of ecclesiastical cognizance, if the words are libelled together as forming one charge, and the sentence appears to proceed on all the words, a prohibition will go.

And this although the party aggrieved by the defamatory words was a clergyman; the rule, if it exists, that the Civil and Ecclesiastical Courts have concurrent jurisdiction when a spiritual person is aggrieved, applying only where he is aggrieved in his ecclesiastical character, as by words spoken respecting his ecclesiastical ministration.

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Where a suit  
is instituted in  
the Spiritual  
Court for defa-  
mation, for  
words contain-  
ing both im-  
putations for



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thereupon exhibited his libel and allegation against *Evans*. The libel was then set out, which charged that in September or October, 1841, *Evans* charged *Gwyn* with intoxication and indecency; and "that the said *Evans*, speaking of and meaning and intending the said *Gwyn*, said, affirmed and published several times, or at least once, certain scandalous, opprobrious and defamatory Welch words, that is to say, (here followed the Welch words) which said several Welch words and expressions, being translated into the English language, have, in their ordinary interpretation, the following sense and meaning (that is to say, "What time did your master come home last night? Was he sober? The black-guard was drunk, he must have been. He, on the night before, on his way from Carmarthen, overtook me on the high road, and attempted to throw me and my horse into the ditch; also put his hand under my safeguard, and then shoved it up under my petticoat, until it reached my knee. I struck him with my whip and galloped off." or words to the like tenor and effect, tending to injure the good name, fame and reputation of him the said *Gwyn*, and meaning by such words (amongst other things), that on the said occasion the said *Gwyn* was not sober, and that he wanted to violate the person of her the said *Evans*, or that he otherwise conducted or wanted to conduct himself indecently or incontinently towards her."

The declaration, after stating that *Gwyn* pleaded negatively to the libel, and that the cause was heard, set out the sentence of the Consistory Court, which decreed that the proctor for *Gwyn* had "fully and sufficiently proved his intention, deduced in the libel," &c., and that *Evans* "did publish and report several scandalous, reproachful and defamatory words in the same libel mentioned," &c. The declaration concluded with the usual prayer of prohibition, on the ground that the Consistory Court had no jurisdiction over the cause.

General demurrer and joinder.

*Bovill* in support of the demurrer. After sentence in the

Ecclesiastical Court prohibition does not lie, unless there appears on the face of the proceedings to be a want of jurisdiction: *Full v. Hutchins* (a); *Churchwardens of Market Bosworth v. The Rector of Market Bosworth* (b), and *Stainbank v. Bradshaw* (c). In *Hart v. Marsh* (d) it appeared that the Consistory Court had pronounced sentence upon articles exhibited against a clergyman, declaring that the said articles were for the most part sufficiently proved. Some of the articles contained charges cognizable at common law, and other of the articles contained charges that were of ecclesiastical cognizance. This Court held that, after sentence, it must be presumed that the Ecclesiastical Court had proceeded upon such matters as were within its cognizance: *Carslake v. Mapledoram* (e). In this case the complaint is, that four defamatory charges were made against Mr. *Gwyn*. 1. That he was a blackguard. 2. That he was drunk. 3. That he was indecent. 4. That he committed an indecent assault. Now, if any of the defamatory words were cognizable by the Temporal Courts only, it is necessary for the plaintiff in prohibition to shew that the Ecclesiastical Court proceeded upon the whole of the defamatory words. But the sentence excludes part of the words, for it says that *Evans* did "publish and report several scandalous, reproachful and defamatory words in the said libel mentioned;" it does not say "the several words in the libel mentioned." The jurisdiction of the Ecclesiastical Court over the offence of drunkenness is saved by stat. 4 Ja. 1, c. 5, s. 8. Even supposing that the sentence did proceed upon all the words, it is not clear that an assault was charged against Mr. *Gwyn*, for the innuendo is, "meaning by such words, among other things, that on the said occasion the Rev. T. B. *Gwyn* was not sober, and that he wanted to violate the person of her the said *Mary Evans*, or that he otherwise conducted, or

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(a) 2 Cowp. 422.

(d) 5 A. &amp; E. 591; S.C. 1 N.


(b) 1 Ld. Raym. 435.

&amp; P. 62.

(c) Note (c) to *French v. Trask*,

(e) 2 T. R. 473.

10 East, 349.

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wanted to conduct himself indecently or incontinently towards her." The innuendo of the assault with intent, and also of the assault, is clearly too large : *West v. Smith* (a).

But in many cases the Ecclesiastical Court has concurrent jurisdiction, as in drunkenness, though they act pro salute animæ, in which case "proceedings in the Spiritual Court being altogether alio intuitu, and not directed to the same objects as they would be if instituted in the Temporal Courts upon the same transaction, are not prohibited on the ground that the matter is cognizable in the Temporal Courts." Lord *Coke* says "the proceedings of the spiritual judges are for the correction of the spiritual inner man, and pro salute animæ to enjoin him penance ; and the judges of the common law proceed to give damage for the wrong and injury done ; as if one lay violent hands on a clerk, the spiritual judge pro salute animæ shall enjoin him penance, and the clerk may have his action of battery and recover damages for the injury done him. 2 Inst. 639 : " *Rogers' Ecc. Law*, 716. See also *Roberts v. Pain* (b) ; 6 *Bac. Abr.* 596 (7th edit.), Prohibition, (L) 5. In *Slader v. Smallbrooke* (c), where a layman had obtained a benefice by forged orders, it was held that the Spiritual Court might try, as the object was deprivation. In *Evans v. Brown* (d), where a woman, who had been charged with incontinence, had brought an action for the words, alleging special damage, and also sued in the Ecclesiastical Court, this Court denied prohibition. [Lord *Denman* C. J. It would not appear in the Ecclesiastical Court that there was special damage, so as to make the words actionable at law.] *Cranden v. Walden* (e) is thus reported. "Prohibition, for saying of a parson he preaches nothing but lies and malice in the pulpit ; for these words are actionable at common law : 1 *Roll. Abr.* 58, *Drake's case*, and therefore not triable in the Ecclesiastical Court. But a consultation was

(a) 4 *Dowl. P. C.* 703.

(b) 3 *Mod.* 67.

(c) 1 *Lev.* 138.

(d) 2 *Ld. Raym.* 1101.

(e) 3 *Lev.* 17.

granted for it, concerning an ecclesiastical person and an ecclesiastical matter—'tis fit to be tried there, and 'tis no certain rule that a thing triable here is not triable there; witness violent hands upon a parson, a pension by prescription, &c." [Lord *Denman* C. J. The jurisdiction of the Spiritual Court in cases of defamation is reserved by the statute *Circumspectè agatis*, 13 *Edw.* 1, st. 4, when money is not demanded.]

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*E. V. Williams* contra. Prohibition after sentence may always be maintained where it appears on the face of the proceedings that the Ecclesiastical Court has exceeded its jurisdiction; *Com. Dig.* Prohibition (D); 3 *Burn's Ecc. Law*, 398 (9th edit.), Prohibition. In *Harris v. Buller* (a) it is said by Sir *W. Wynne*, that it is not sufficient merely that the words impute an ecclesiastical offence; it must be an offence also which will not be punishable at common law. If the words are "that such a person is a bawd," suit lies in the Ecclesiastical Court; but if they are "that such a person keeps a bawdy house," they are out of the jurisdiction of that Court, because it may be the subject of indictment; and though the latter cannot be charged without charging the other also by inference, it has always been held a ground of prohibition, as the Courts of Common Law have determined that there can be no suit for defamation in the Ecclesiastical Court when an action would lie at common law. In 2 *Burn's Ecc. Law*, 126 (9th edit.), Defamation, it is said, "Words which impute an offence cognizable in a Spiritual Court, may be punished in that Court. But three incidents are required in a suit for spiritual defamation. 1. That it concerns matter merely spiritual and determinable in the Ecclesiastical Court, as calling a person "heretic, schismatic, adulterer, fornicator, &c. 2. It ought to concern matter merely spiritual only, for if such defamation touches or concerns any thing determinable at the common law, the ecclesiastical judge shall not have cognizance of it. 3. He

(a) 1 Hag. Cons. R. 464, n.

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who is defamed cannot sue there for amends or damages, but only for the punishment of the sin *pro salute anime* and for costs. If, therefore, words for which an action would lie are coupled with words which are a spiritual defamation, and a suit is instituted in the Spiritual Court for the whole, a prohibition lies." The above doctrine is supported by ample authority: *Holingshead's* case (a); *Lockey v. Dangerfield* (b). [Lord Denman C. J. In *Com. Dig. Prohibition* (G. 14), it is said the Court Christian has jurisdiction, "though the words import a spiritual crime, which in some respect is punishable by the common law, if the spiritual jurisdiction is not taken away, as if he says, A. keeps a bawdy house; for though it be indictable, the Spiritual Court has a concurrent jurisdiction."] That is not law. In *Com. Dig. Prohibition* (G. 14), it is said, "if part of the words are actionable, a prohibition goes for the whole, though the others charge with a spiritual crime, as if he says, you are a whore and a thief." In *Carslake v. Mapledoram* (c) the words charging a past contagious disease were not actionable. In this case the words all appear to have been spoken on one occasion, and "several" evidently means "the several." In *Hart v. Marsh* (d) there were distinct articles. The Spiritual Court would have no jurisdiction, even for the imputation of drunkenness, unless applied to a clergyman in the discharge of his ecclesiastical functions: *Cucko v. Starre* (e).

*Bovill* replied.

LORD DENMAN C. J.—(After stating the pleadings, &c.) In the first part of the words, which are made the subject of suit in the Ecclesiastical Court, the imputation is, that the complainant was a blackguard, and that he was drunk, but the latter part is the material part, imputing an attempt

(a) Cro. Car. 229.

(b) 2 Str. 1100.

(c) 2 T. R. 473.

(d) 5 A. &amp; E. 591; S. C. 1 N.

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(e) Cro. Car. 285.

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to commit a rape, and certainly imputing an assault. It appears to have been laid down in very early times, that under these circumstances defamation is not cognizable by the Spiritual Court. Thus it is said in *Fitz. N. B.* 53 F., "all the justices are against a consultation in a cause of defamation, because it seems he may have his action at common law for the same defamation." So in *Com. Dig. Prohibition* (G. 14), "But, if a libel be for words which are actionable, a prohibition goes, as if they charged with felony," citing, among other authorities, the above passage from *Fitzherbert*. Again, in the next page of *Com. Dig.*, "So, if part of the words be actionable, a prohibition goes for the whole, though the others charge with a spiritual crime; as if he says, you are a whore and thief," citing, among other authorities, *Mellet v. Herbert* (a). Taking this, therefore, to be the usual rule of law, prohibition might clearly have been granted in this case before sentence. Can then the prohibition be granted now after sentence? This depends upon whether it clearly appears that the sentence has proceeded on all the words. The sentence states that *Evans* did publish "several scandalous, reproachful and defamatory words in the said libel mentioned." It is said that "several" excludes some part of the words in the libel mentioned. If there had been *distinct* articles of charge in this case, as in *Hart v. Marsh* (b), and the sentence had stated that they were "for the most part sufficiently proved," as in that case, we might, according to that authority, take the sentence distributively, and presume that the words for which there would be a remedy at law were not proved. But there is no such force in the word "several" in this case—it does not say "several of the words," or that "the words for the most part were proved." I think, therefore, that the sentence proceeds for all the words. It is quite necessary to limit jurisdiction for such a cause, otherwise Courts might maintain jurisdiction in all

(a) 1 Sid. 404.

(b) 5 A. &amp; E. 591; S. C. 1 N. &amp; P. 62.

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cases, by coupling matter out of their jurisdiction with some matter within it. Our judgment, therefore, must be for the plaintiff.

PATTESON J.—I am of the same opinion. The words set out in the libel charge an offence cognizable in the Temporal Courts. It is said that the only charge is one of drunkenness and indecency. But the words clearly charge an assault, and it is certain that an action of slander would lie for such words. It is said that after sentence, at all events, the jurisdiction of the Spiritual Court may be supported, as part of the slander, at all events, was not cognizable in the Temporal Courts. That would be very true if the sentence applied only to that part of the slander. But it is plain that the article “the” is accidentally left out before the word “several,” and that the sentence proceeds upon all the words. If that be so, the case in which it appeared that from the sentence itself that the charge had been proved in part only, does not apply. It is clear that prohibition would have been granted before sentence. Can it be granted now? *Full v. Hutchins (a)* makes this point clear. There the libel was for tithes, and a modus and custom were set up, and the Spiritual Court inquired into these and gave sentence. A prohibition was applied for, and it was refused on the ground that the Spiritual Court had cognizance over the principal matter, and that the other matter had arisen incidentally, but it was not doubted that, if the want of jurisdiction had appeared on the face of the libel, the prohibition must have been granted, notwithstanding the sentence. Here it does appear after sentence that the Spiritual Court had no jurisdiction.

It is said how that in some cases the Spiritual and the Temporal Courts have concurrent jurisdiction. If it were necessary to consider *Cranden v. Walden (b)*, I might require time for the purpose. But the case is by no

(a) 2 Cowp. 422.

(b) 3 Lev. 17.

means the same, for there the words related to the clergyman in the exercise of his office. In that case both the person and the matter were ecclesiastical. Here the matter is not ecclesiastical. I can find no other case where it has been held that there was concurrent jurisdiction.

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WILLIAMS J.—It is not, as I understand the argument, contended that prohibition may not go where the jurisdiction is exceeded, whether before or after sentence, but it is contended that sentence shifts the presumption as to jurisdiction. It is asked, do the words in the libel impute an assault? There can be no question on that. But the question is, whether you can sever those words from the rest. It is said that you may, because the charge is limited by the innuendo. But I think we must take the libel and the sentence together, that all the words were the foundation of the sentence. It is said that “several” must mean part of the words. But the judgment states that the proctor for *Gwyn* has proved his “intention.” That, of course, does not mean “animus,” but the charge. If so, the Spiritual Court has passed sentence as to something over which they had no jurisdiction.

WIGHTMAN J.—It is clear that in general the Spiritual Courts have not concurrent jurisdiction with the civil in matters of defamation. It is true that there are cases where the slander is spiritual, as in *Cranden v. Walden* (a). It is said here that the innuendo makes the words cognizable only in the Spiritual Court. But it is only part of the innuendo to which any such effect can be attributed; the rest of the innuendo indicates an offence cognizable in the Temporal Courts. I think the sentence is to be taken as applicable to “the” several defamatory words. If some of the words were not cognizable in the Spiritual Courts, and the sentence proceeded upon all, I think the prohibition ought to

(a) 3 Lev. 17.



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go on the authorities cited, and also on the authority of the *Anonymous* case in 3 *Mod.* (a).

Judgment for the plaintiff.

(a) P. 74.

LAWES and another v. SHAW (b).

In an action of debt on a money bond, where breaches have been assigned in the replication, and defendant has then suffered judgment by default, such assignment of breaches is regular, and a writ of inquiry may be executed thereupon, the ordinary course of striking out the pleadings subsequent to the declaration and suggesting breaches being only a practice adopted for the sake of convenience.

The Lord Chancellor made an order under 1 & 2 *Will.* 4, c. 66,

directing each official assignee of the Court of Bankruptcy to pay into the Bank of England all such sums of money as should come to his hands as soon as they should amount to 100*l.*, and to state, among other particulars, "the name and description of the bankrupt or bankrupts to whom the money belonged." *Held*, that, under this order, an official assignee is bound to pay into the bank as soon as the moneys in his hands from several estates amount in the whole to 100*l.*

**DEBT** on bond. The bond was set out on oyer, and purported to be the joint and several bond of the defendant *Shaw, James Clark*, and other obligors, given to the plaintiffs as registrars of the Court of Bankruptcy. The condition recited, that *Clark* had been chosen an official assignee, and that the defendant and the other obligors had agreed to become sureties for the due performance of that office by him, and was, "that the said *James Clark* should well and truly perform all the duties of the said office," required by the 1 & 2 *Will.* 4, c. 56, under which the court was constituted, or any other statute, &c., "or required by any rule or regulation made or to be made in pursuance of the first-mentioned statute, &c.;" that he should faithfully execute all trusts reposed or to be reposed in him as such assignee, or, in case of default, pay to the chief registrar, for the uses therein specified, such sum or sums as should be chargeable upon him in respect of such default; or that defendant and the other sureties should severally make good to the chief registrar all defaults in such payments to the several amounts for which they had agreed to become sureties.

(b) Decided in Michaelmas Vacation (December 5th).

Plea, performance of the duties, &c., and payment of the sums as set out in the condition (following its words).

Replication, that by a rule made by the Lord Chancellor, in pursuance of the statute before mentioned (1st September, 1836), it was ordered that each official assignee should pay into the Bank of England, to the credit of the accountant in bankruptcy, all such sums of money as should come to his hands as soon as they should amount to 100*l.*, and at the time of paying such moneys should state in writing, delivered therewith to the Bank of England, the date and amount of the payment, the name and description of the bankrupt or bankrupts to whom the money belonged (with other particulars) (*a*). That divers sums of money were paid to *Clark*, an official assignee, on account of estates of bankrupts above the sum of 100*l.* on each of the said estates respectively; that *Clark* did not pay in the said moneys at the Bank of England; and that neither *Clark* nor the sureties made good the default, &c. The replication then assigned breaches as follows:

"And, for assigning a further breach of the condition of the said writing obligatory, according to the form of the statute in that case made and provided, the plaintiffs say that, after the passing of the statute in the condition," &c., "and in the said plea mentioned, and after the making of the said rule, &c., and while the said rule, &c., continued in full force and effect, and whilst the said *James Clark* was and continued official assignee, &c., and before the commencement of this suit, to wit, on, &c., divers large sums of money were paid to the said *J. Clark* as such official assignee as aforesaid, on account of divers estates of divers persons, who had theretofore respectively become bankrupts, and had been declared bankrupts under certain commissions of bankrupt, and fiats issued against them, which said last-mentioned sums of money amounted in the whole to a sum of money over and above the sum of 100*l.*,

(*a*) See the order in 2 Mont. & Ayrton, Law and Practice of Bankruptcy, 353, 2nd edition.

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to wit, the sum of 7700*l.*; and the said last-mentioned sum of money had been paid to, and had come to, and then was, at one time, to wit, on the day and year last aforesaid, in the hands of the said *J. Clark*, an official assignee of the said several estates last aforesaid; yet the said *J. Clark* did not nor would at any time pay the said last-mentioned moneys into the Bank of England, but kept and detained the said moneys so received and held by him at one time as aforesaid, as official assignee as aforesaid, to an amount beyond the sum of 100*l.*, to wit, to the amount in this breach mentioned, in his hands, to wit, from the day and year last aforesaid until afterwards, to wit, on the 10th day of April, A.D. 1841, when the said *J. Clark* resigned his said office as official assignee of the Court of Bankruptcy." That the said last-mentioned sum continued and continues in the hands of the said *J. Clark*. That, although the said *J. Clark* made default as aforesaid, yet he hath never at any time since the said last-mentioned default paid to the chief registrar of the said court of bankruptcy, or to any other person, the said last-mentioned moneys, or any part thereof, although he was afterwards duly requested so to do; nor hath the defendant, nor have the other sureties, or any or either of them, made good the default to any amount to the chief registrar, or repaid to him any part of the said moneys, although, &c. (averment of notice and request); and the said moneys in this breach mentioned still remain due and unpaid, contrary to the tenor, &c., of the said condition, &c." Verification. There were also other breaches not here set out.

The defendant having rejoined specially, the plaintiffs demurred; the defendant then withdrew his rejoinder. Judgment by default. The plaintiffs then sued out a writ of inquiry of damages; the writ set out the pleadings above abstracted, concluding with the replication, and commanded the sheriff to summon a jury to inquire into the truth of the said breaches, and to assess the damages sustained by the plaintiffs by reason of the breaches.

The inquiry was executed before *Wightman J.* at the

sittings in Middlesex after Hilary Term, 1843, when the jury awarded the plaintiffs 999*l.* 16*s.* damages on the second breach, and 1*s.* on each of the others.

In the following term *Crompton* obtained a rule nisi to set aside the writ of inquiry and all proceedings thereon, for irregularity, with costs, or for a new inquiry, or to reduce the damages on the second breach to 1*s.* The principal grounds of the motion were, 1. That the defendant having failed to rejoin, all the pleadings subsequent to the plea ought to have been struck out, and breaches assigned under stat. 8 & 9 *Will.* 3, c. 11, as if there had been judgment for want of a plea, and that the breaches were improperly assigned in the replication. 2. That the Lord Chancellor's order had been improperly construed on the inquiry, as if it was necessary for the official assignee to pay in whenever he had received a sum amounting to 100*l.* from several estates together, whereas it was only intended that he should pay in whenever the sum amounted to 100*l.* on any particular estate.

In Michaelmas Term, 1844,

*Platt* and *W. H. Watson* shewed cause (*a*). The cases cited as to the first point were, *Petrie v. Fitzroy* (*b*), *Gainsford v. Griffith* (*c*), *Parkins v. Hawkeshaw* (*d*), *Quin v. King* (*e*), *Cutler v. Southerne* (*f*), *Roberts v. Mariett* (*g*).

*Crompton* and *Cleasby* contra.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an application to set aside a writ of inquiry for irregularity, or to set aside the verdict and for a new trial, or to reduce the damages on the second breach

(*a*) November 22, before Lord  
*Denman* C. J., *Williams*, *Cole-*  
*ridge* and *Wightman* Js.

(*b*) 5 T. R. 152.

(*c*) 1 Wms. Saund. 58, 6th ed.

(*d*) 2 Stark. N. P. C. 381.

(*e*) 1 M. & W. 42 : S. C. Tyr.  
& G. 407.

(*f*) 1 Wms. Saund. 116, note 2.

(*g*) 2 Wms. Saund. 187.

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to 1s. The nature and validity of the objections will be best considered by adverting with some particularity to the state of the record, in order that it may be distinctly seen what was the subject of the inquiry, and in respect of what damages were assessed. The declaration is in debt upon a common money bond, from which, together with the condition, being set out upon oyer, it appears that the bond was entered into by the defendant and others for the due performance of the duty of official assignee by *Clark*, to which office the said *Clark* had been appointed. The defendant, therefore, pleads performance generally by the said *Clark*. The plaintiff, in his replication, assigned several breaches, the first and sixth alleging the receipt by *Clark* of divers large sums of money, and a failure by him in paying over the same according to the provisions of the said bond. The plaintiff signed judgment for want of a rejoinder, and caused a writ of inquiry to be issued, reciting all the pleadings down to the end of the replication, in which the breaches were assigned, and stating the default of the defendant in not answering the matters alleged in the replication, although a day was given for the purpose, and the interlocutory judgment upon such default, and concluding in the usual form.

The defendant contended that the proceedings as shewn by the writ were irregular, and that none of the pleadings subsequent to the declaration should have been stated; and that when the plaintiff signed judgment for want of a rejoinder, both plea and replication were to be struck out, and the judgment was to be treated as a judgment for want of a plea, and not for want of a rejoinder, and that plaintiff was bound to enter a suggestion of breaches after his judgment by default, the previous assignment of breaches in the replication being a mere nullity; and he relied upon the case of *Petrie v. Fitzroy* (a). We are, however, of opinion that there is no weight in the objection, and that wherever the nature of the case requires that the previous

(a) 5 T. R. 152.

pleadings down to the default should appear upon the record, they ought to be entered; and that it is only as a rule of convenience and to save expense, that in ordinary cases, where the pleadings subsequent to the declaration have become useless, they are not entered on the roll. This is the distinction taken in the case of *Petrie v. Fitzroy* (a), relied upon by the defendant, but which is really an authority in favour of the plaintiff.

The statute 8 & 9 Will. 3, c. 11, s. 8, obliged the plaintiff either to assign or suggest breaches. He might have done so in his declaration, but did not, and was consequently bound to assign breaches in his replication, if the defendant pleaded, and to suggest them if the defendant suffered judgment without pleading. The defendant pleaded performance, and the plaintiff in his replication assigned breaches as he was bound to do, to which breaches the defendant admits he has no answer, but suffers judgment. The plaintiff would not be at liberty to waive the breaches so assigned, to which the defendant might have an answer, and therefore it is essential, from the very nature of the case, that the previous pleadings down to the default should appear upon the record. Upon this point the case of *Walker v. Priestley* (b), though it has been overruled in other respects, is an authority. It was there considered by the Court, that in debt on bond for the performance of covenants, where the defendant pleaded performance, and the plaintiff assigned breaches, to which the defendant did not rejoin, the plaintiff could not waive the breaches which were entered on the rolls, but might take judgment for want of a rejoinder. The course pursued by the plaintiff appears to us not only to be the convenient but the proper course, and fully authorised by the cases of *Petrie v. Fitzroy* (a), and *Walker v. Priestley* (b).

It was also objected, that, according to the true intent and meaning of the Lord Chancellor's order, which is set forth in the first breach assigned in the replication, the said

(a) 5 T. R. 152.

(b) 1 Com. Rep. 376.

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*Clark* was not bound to pay into the Bank of England, upon the receipt thereof, "moneys over and above 100*l.* on each of such bankrupt's estates," amounting in the whole to a large sum of money, which said sums had been paid to, and were at one time in the hands of the said *Clark*, on account of the several estates of which the said *Clark* was official assignee. To this objection the Court, at the time of the argument, was disposed to attribute little weight, and, upon further consideration, we continue to think it to be unfounded. Upon the proper construction of the said order of the Lord Chancellor, we are of opinion that *Clark* was bound to pay over, as required, sums received "over and above the sum of 100*l.*, on each of the said estates respectively;" and that the breach is therefore in that respect properly assigned. The rule, therefore, must be discharged.

Rule discharged.

Tuesday,  
May 8th.

Ex parte The Duke of MARLBOROUGH.

Spoken words, charging a magistrate with corrupt and oppressive conduct, are not the subject of criminal information, unless they are spoken at a time when he is in the actual execution of his office.

SIR F. THESIGER S. G. moved, on the part of the Duke of *Marlborough*, for a criminal information against *L. C. Humfrey*, Esq., for words spoken of the Duke.

The language in question was addressed by Mr. *Humfrey* to a large body of the electors of Woodstock, at the nomination of candidates for the representation of that borough in parliament in April last. Mr. *Humfrey* was one of the candidates. The Duke at that time was a justice of the peace for the county of Oxford. The material parts of the language, as set out in the affidavits, were as follows:—"There is a man named *Harris*; *Harris* was a respectable man, but not rich; he held a cottage under the Duke and kept a horse. One day he took his horse to water at a pit to which he certainly had no legal right to go; and *Timothy Slingo*, the Duke's hayward, passing by, took up the horse and put it into the pound. *Harris*

touched the horse with his whip, and it broke from the hayward's custody, and naturally enough ran back to its own stable. *Harris* was summoned for rescuing the horse and committing breach of pound; he was fined 1s. and the costs, which amounted to the sum of 19s. 6d. This was more than he could pay, and he went to gaol. When he was in gaol his creditors came upon him, his property was seized and sold under an execution. He became a ruined man, and is now at work upon the roads. Before he was fined, two magistrates refused to find him guilty. Two magistrates, before whom he was first brought, refused to convict him, because they considered that the hayward had somewhat exceeded his duty. He was then brought before the Duke, a fit judge in his own cause, and, sitting on his own dog kennel, with a glass of ale in his hand, the Duke of *Marlborough* himself convicted *Harris* and sent him to gaol." The affidavits contained three other charges, but they in no way related to the Duke as a magistrate. All the charges were denied on affidavit.

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Lord DENMAN C. J.—This is an application to the Court to exercise its extraordinary jurisdiction in respect of words spoken of the Duke of *Marlborough*. The words certainly contain most grievous imputations, and we cannot wonder that the Duke should take the earliest opportunity of coming into Court and denying the truth of them. The opportunity afforded for such denial is one of the benefits of the proceeding by criminal information. The question is, whether the words are of such a nature as to warrant us, according to the practice of the Court, in granting the remedy applied for. With respect to the three last charges, it is quite clear upon all the authorities that such charges conveyed by words merely spoken are not the subject of a criminal information, unless they can be taken as a provocation to a breach of the peace by a threat of personal violence or a challenge.



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The words on which we have had some doubt, are those which charge the Duke with corrupt conduct as a magistrate. The denial of the charge is certainly most complete. But we can find no instance where words spoken have been held ground of criminal information, unless where they have been spoken at a time when the magistrate has been in actual execution of his office. The Court does interfere in such cases, because the words amount to an obstruction of the course of justice. In such cases the magistrate may undoubtedly treat the matter as a contempt, but in my opinion it is more convenient that he should call for the interposition of this Court. There is no decision that this Court will interfere merely because the words spoken apply to a magistrate in his judicial capacity. Mr. *Starkie*, in his *Treatise on the Law of Slander and Libel*, published in 1830 (*a*), after stating that defamatory words spoken of magistrates in their absence, and not relating to the execution of their office, are not indictable, adds, "But the case might fall under a very different consideration, if a magistrate were to be charged with some specific act of oppression or corruption in his judicial capacity." But this passage is not founded upon any authorities; the Solicitor General has not referred to any authorities which support the proposition, nor do I believe that any can be found. We could not grant this information without creating a precedent, and we ought not to do so without seeing that the law of the land will justify us in it. There is another reason why this Court should be unwilling to treat mere words as the subject of an information. There is much uncertainty in the proof of mere words, and the circumstances under which they are uttered may afford much room for qualifying or explaining them. We could not interfere in such a case as the present, without setting an example which might lead to much inconvenience, and

(a) 2d vol. p. 199 (2d ed.).

without inducing a lengthened inquiry, which would end in nothing satisfactory.

PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

Rule refused.

HERBERT v. SAYER.

**ASSUMPSIT** against the acceptor of a bill of exchange, drawn by *Thomas Spence*, on the 9th June, 1842, for 30*l.*, payable three months after date, indorsed by *Spence* to *Thomas Rogers*, and by *Rogers* to the plaintiff.

Plea 4 (which led to an issue in fact, but a reference to which is necessary to make the material pleas intelligible) stated, that defendant accepted the bill at the request of *Spence*, and without ever having received any consideration or value whatever for his acceptance, and for the accommodation of *Spence*, and in order that he might deposit the same with *Rogers* as a collateral security as after mentioned, and for no other purpose whatever; that after defendant had so accepted, to wit, 9th June, 1842, *Spence* indorsed and delivered the bill to *Rogers*, and *Rogers* took and received the same as a collateral security for the payment of the sum of 25*l.* then due to *Rogers*, as the balance of a certain other bill of exchange for 50*l.* then in his possession, and of which he was the indorsee and holder, to wit, a bill drawn by *Spence* upon and accepted by one *Foster*, at three months, payable to *Spence's* order, and which bill *Spence* indorsed to one *Baker*, who indorsed the same to *Rogers*, the residue of the last mentioned bill, to wit, 25*l.* having been paid to *Rogers* by the said *Spence* before the

drawer, to be by him deposited with *R.* as collateral security for a debt due from the drawer to *R.*; that before the bill became due, the drawer paid off the debt, and that *R.* afterwards indorsed to the plaintiff, in order that the plaintiff, colluding with *R.*, might recover the amount of the bill as trustee for *R.*; that the plea was in excuse, and not in discharge, so that *de injuria* was a good replication.

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The Duke of  
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Friday,  
April 26th.

Under stat. 6 Geo. 4, c. 16, ss. 63, 127, & 1 & 2 Will. 4, c. 56, s. 25, a person who has been twice bankrupt and obtained his certificates, but has not paid 15*s.* in the pound, may maintain an action in respect of property acquired since his last certificate, unless his assignees interfere. So held in the Exchequer Chamber, reversing the judgment in *Q. B.*

Held, in *Q. B.*, in an action by the indorsee of a bill of exchange against the acceptor, where the plea stated that the bill was accepted for the accommodation of the

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indorsement to *Rogers* of the bill in the declaration mentioned, and that the bill in the declaration mentioned was delivered to and received by *Rogers* for such purpose as in this plea mentioned, and no other purpose or consideration or value whatsoever. That after *Rogers* had taken and received the bill in the declaration mentioned, and whilst the same was in his custody and possession, and before the same had become due or payable, to wit, 9th July, 1842, *Spence* paid to *Rogers*, who then accepted and received the same, a certain sum of money, to wit, 15*l.*, in part payment of the said balance of 25*l.*, then remaining due and payable to *Rogers* on the bill for 50*l.*; and then there remained due in respect of the last mentioned bill a certain small sum of money, to wit, 10*l.* and no more. That afterwards, and whilst the bill in the declaration mentioned was in the custody and possession of *Rogers* for such purpose as aforesaid, and before the same had become due or payable, to wit, 1st September, 1842, *Spence* tendered and offered to *Rogers* a certain sum of money as and being the balance then remaining due on or in respect of the bill for 50*l.* and also for or in respect of any interest or damages which might have accrued or could be claimed by *Rogers* on or in respect of the last mentioned bill, to wit, 11*l.*, which last mentioned sum was the full amount to which *Rogers* was at the time of the said tender entitled upon or in respect of the bill for 50*l.*, to secure the payment of which the bill in the declaration mentioned was deposited with *Rogers* as in this plea aforesaid; and which tender and offer of *Spence*, *Rogers* then wholly refused to accept or receive, and then wrongfully kept and detained the bill in the declaration mentioned, and wholly refused to deliver up the same either to *Spence* or defendant, or any other person, although he was then, to wit, on, &c., requested by *Spence* and defendant so to do. That after the tender had been so made to and refused by *Rogers*, and after *Rogers* had so wrongfully refused to deliver up the bill, to wit, &c., *Rogers* indorsed the bill in the declaration mentioned to plaintiff,

and plaintiff then took and received the bill in the declaration mentioned, with full knowledge and notice of the premises. Verification.

Plea 6. That defendant accepted the bill in the declaration mentioned for the accommodation of *Spence*, and without ever having received any consideration or value for the acceptance thereof, and for the purpose and in the manner and form as in the fourth plea above alleged; that *Spence* deposited the bill with *Rogers*, who received the same for the purpose and in the manner in the fourth plea in that behalf alleged, and for no other purpose, consideration or value whatever. That *Spence* paid to *Rogers* the sum of money in the fourth plea in that behalf mentioned, to wit, 15*l.*, in part payment of the said balance of 25*l.*, in manner and form as and at the time in the fourth plea alleged. That *Spence* tendered and offered to *Rogers* the said sum of money in the fourth plea in that behalf mentioned, being the balance remaining due to him upon and in respect of the bill for 50*l.* in the fourth plea mentioned, at the time therein mentioned, which said sum *Rogers* then wholly refused to accept, as in the fourth plea mentioned, and then refused to deliver up and wrongfully detained the bill in the declaration mentioned, in manner and form as in the fourth plea in that behalf alleged. That after the said tender to and refusal by *Rogers*, and after his said refusal to deliver up the bill in the declaration mentioned in the fourth plea alleged, to wit, on, &c., *Rogers* indorsed the bill in the declaration mentioned to plaintiff, with intent and in order to cheat and defraud defendant of the amount thereof, by plaintiff's suing defendant upon the same, as a mere trustee for *Rogers*, and forcing and compelling defendant to pay the bill without the plaintiff's having any beneficial interest in the same; and plaintiff then took, had and received the bill in the declaration mentioned with the same intent and purpose, and he and *Rogers* then conspired and colluded together to cheat and defraud defendant of

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the amount of the bill in the declaration mentioned by the means aforesaid. Verification.

Replication : de injuriâ.

Special demurrer, assigning for cause that the matters of defence do not merely amount to an excuse, but shew that defendant never was liable to perform his promise, and never was liable to pay plaintiff; and that therefore the replication de injuriâ is inappropriate, and that the replication is multifarious.

Joinder in demurrer.

Plea 7. That before and on March 1st, 1830, and thence to the suing out of the commission of bankrupt after mentioned, plaintiff was a trader, subject to the statutes then in force concerning bankrupts, &c. The plea then averred a petitioning creditor's debt, and proceedings in bankruptcy down to the commission, which was dated the 10th March, 1830, and on the plaintiff's certificate, which was dated the 14th May, 1830. That afterwards, and after the passing of a certain act, &c. (Bankruptcy Court Act, 1 & 2 Will. 4, c. 56), and before the accruing of the causes of action, and thence until the issuing of the fiat after mentioned, plaintiff was a trader, &c. The plea then averred a second bankruptcy of the plaintiff, and proceedings thereon down to the fiat, which was dated the 20th August, 1839; an appointment of the official assignee, one *Cannan*, dated 21st August, 1839, appointment of the creditors' assignee, one *Pare*, dated 30th August, 1839, and acceptance by the latter; also a certificate, dated the 21st November, 1839; that the estate of plaintiff, under the said fiat, did not produce, nor has yet produced, sufficient to pay every creditor under the fiat 15s. in the pound on the amount of their respective debts proved under the fiat; and none of the said creditors has as yet received 15s. in the pound on the amount of their said debts. That the bill of exchange in the declaration mentioned was indorsed to plaintiff, and the cause and causes of action thereon accrued to him after the said signing and allowing of the said last mentioned

certificate, whereby and by force of the statute in such case, &c., the cause of action in the declaration mentioned, and the sum of money therein claimed and demanded, are vested in the said *Pare* and *Cannan*, as such assignees under the said fiat, according to the form of the statute in that case, &c. Verification.

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Special demurrer, assigning for cause that, although the bill of exchange distinctly appears to be after-acquired property, that is to say, indorsed to plaintiff, and the cause and causes of action therein accrued to him after the alleged signing and allowance of the last mentioned certificate, yet it does not appear that *Pare* and *Cannan*, or either of them, hath ever interfered with plaintiff in, about or in respect of the cause or causes of action thereon, nor that they have brought any action upon the bill, or taken any legal or other proceedings for the recovery of the amount thereof, or any part thereof; but it is consistent with the allegation in the plea, that plaintiff may sue for the same either in his own right for his own benefit, or as trustee for the assignees under the fiat.

Joinder in demurrer.

The demurrer was argued in Easter Term last (May 2), by *G. Atkinson* for the plaintiff, and by *Willes* for the defendant (*a*).

*Cur. adv. vult.*

Lord DENMAN C. J., in the following vacation (May 17), delivered the judgment of the Court as follows:—The replication to the sixth plea in this case being *de injuriâ*, the question is raised whether that plea discloses matter in excuse or in discharge.

In the case of *Salter v. Purchell* (*b*), the same question was raised, but under circumstances so unlike the present, that the case affords no guide to us.

(*a*) Before Lord Denman C. J.,  
*Patterson and Williams* Js.

(*b*) 1 Q. B. 209, in Exch. Ch.  
reversing *Purchell v. Salter*, 1 Q.  
B. 197; S. C. 1 G. & D. 682.

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The case of *Humphreys v. O'Connell* (a) is more like the present, where the plea was held to be in excuse. But the case of *Mitchell v. Cragg* (b) still more resembles the present, and there also the plea was considered to be in excuse. *Parke B.* there says, "The breach is that the defendant did not pay the plaintiff: the plea in truth says, I admit I never did pay the plaintiff, because he was the holder of the bill under such circumstances that he was not entitled to be paid; it is like the case of *Isaac v. Farrer* (c)."

In the present case the plea shews nothing illegal in the bill originally; it shews that the defendant accepted it for the accommodation of the drawer *Spence*, to enable him to deposit it with one *Rogers*, as a collateral security for a debt due to *Rogers* from *Spence*; that *Rogers* took it on those terms; that *Spence*, before the bill became due, paid *Rogers* part of that debt and tendered the residue; that *Rogers* refused to receive the money tendered, kept the bill, and indorsed it to the plaintiff as a mere trustee, *Rogers* and the plaintiff conspiring and colluding to cheat the defendant. These averments are said to shew illegality in regard to the bill, but in truth they amount to little more than a statement that the plaintiff took the bill with knowledge of the circumstances, and without giving any consideration for it.

The matter therefore stands thus; that the bill was originally given to *Rogers*, but not to be enforced under certain circumstances; that these circumstances occurred before the bill became due, and that *Rogers*, knowing he could not enforce the bill, indorsed it to the plaintiff, that he might attempt to do so, for his, *Rogers's*, benefit. If *Rogers* had been the plaintiff, the direct transaction with him might perhaps have been matter of discharge; but as the plaintiff is a stranger to the defendant, and *prima facie* there is a promise in law by the defendant to pay the plaintiff, arising

(a) 7 M. & W. 370.      (b) 10 M. & W. 367.      (c) 8 M. & W. 673.

out of the indorsement of the bill, the plea which discloses transactions with the former holder, *Rogers*, and the circumstances under which the plaintiff took the bill from him, amounts only to an excuse for not performing to the plaintiff that *prima facie* promise, and the replication *de injuriâ* is good.

The seventh plea in this case states, that the plaintiff has been bankrupt twice, and obtained his certificate each time, but that his estate under the second bankruptcy has not paid 15*s.* in the pound, and that the bill was indorsed to him after his second certificate. To this there is a special demurrer, assigning for cause that it does not appear that the plaintiff's assignee had interfered, and that it is consistent with the plea that the plaintiff may be suing either in his own right or for the benefit of the assignee. It is contended for the plaintiff that he has a right to sue, unless his assignee interferes, and that the allegation of such interference should be made by the defendant in order to defeat the action. The defendant, on the other hand, contends that the law passes the interest in the bill to the assignee, who can sue on it in his own name, and that the plaintiff is bound to shew that the assignee has relinquished his right to do so.

The case of *Young v. Rishworth* (a) is a direct authority in favour of this plea. The effect of that decision is said by Parke B. in *Fyson v. Chambers* (b) to be, that the plea is *prima facie* an answer to the action, and that the facts of plaintiff being a mere trustee, or having the assent of his assignee, ought to be replied; and the case of *Fyson v. Chambers* (b), which recites that a mere wrongdoer cannot in trover set up the title of the assignees, was distinguished by the Court. Whether it be in truth distinguishable, or be contrary to *Young v. Rishworth* (a), we will not now elaborately discuss; it is sufficient to say that we are satisfied with the decision in *Young v. Rishworth* (a), and that

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(b) 9 M. & W. 460.



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it is so directly in point that we think the defendant entitled to our judgment upon this plea.

The result is, that the judgment will be for the plaintiff on the replication to the sixth plea, and for the defendant on the seventh plea.

Judgment for plaintiff on replication to sixth plea.  
For defendant on seventh plea.

Error having been brought by the plaintiff on this judgment, the case was argued (a) in Michaelmas Vacation last, by

*Erle* for the plaintiff, and

*Byles Serjt.* for the defendant.

*Cur. adv. vult.*

TINDAL C. J. now delivered the judgment of the Court as follows:—The question in this case arises upon a demurrer to the defendant's last plea, on which the Court of Queen's Bench gave judgment in favour of the defendant; and on that judgment a writ of error had been brought.

The action was at the suit of the indorsee of a bill of exchange against the acceptor; and the plea was, in substance, that before the indorsement the plaintiff had twice become a bankrupt; that a commission issued against him, under which he had obtained his certificate, and afterwards a fiat, under which also he had obtained his certificate, but that his estate under the fiat had not been sufficient to pay each creditor 15s. in the pound; that the bill of exchange was indorsed to the plaintiff after the allowance of the last certificate, whereby the cause of action on the bill was vested in the assignees under the fiat.

To this plea there was a demurrer, assigning special

(a) Before *Tindal C. J.*, *Coltman*, *Erskine* and *Maule Js.*, and *Alderson*, *Gurney* and *Rolfe Bs.*

causes, including the main objection, which however would arise on general demurrer; and that objection is, that the plea is bad because it does not state that the assignees under the fiat, or either of them, had interfered, or required the defendant to pay them the amount of the bill.

The point to be considered and decided is of great importance; it relates to the right of a bankrupt twice certificated, and who has not paid 15s. in the pound, to after-acquired property, such as the bill for which he sues. And the question is, whether he has a good right to such property against the parties to the bill and all the world, except the assignees, or no right whatever, so that he could not sue at all upon the bill.

We are of opinion that he has a good right, except as against the assignees; and as the plea does not state that they have interfered, it does not contain a complete defence. And to this conclusion we have come, as well upon the authorities as upon the reason and convenience of the principle which they establish.

In the first place, a bankrupt in this condition is, we think, in the same situation with respect to property acquired after a second certificate, as an uncertificated bankrupt was with respect to property acquired after the assignment before the recent statutes.

By stat. 6 Geo. 4, c. 16, s. 127, which provides for the after-acquired property of a bankrupt twice certificated, it is enacted, that the future estate and effects of the bankrupt (except tools, &c.) shall vest in the assignees under the commission, "who shall be entitled to *seize the same in like manner* as they might have seized property of which such bankrupt was possessed at the issuing the commission." Such effects, by the former statute 5 Geo. 2, c. 30, s. 9, were only liable to the execution of a creditor. The effect of this section is to put such future property on the same footing as future property under the assignment. The operation of the assignment is by stat. 6 Geo. 4, c. 16, s. 63, which provides that the commissioners are to assign

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to the assignees all present and *future* personal estate of such bankrupt, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, *before he shall have obtained his certificate*, and all debts due or to be due to him, as fully as if the assurance, whereby they are secured, had been made to such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him, shall have power to recover the same; but the assignees shall have like remedy to recover the same that the bankrupt might have had if he had not been adjudged bankrupt. By stat. 1 & 2 *Will.* 4, c. 56, s. 25, the estate becomes vested to the same extent in the assignees by virtue of *their* appointment, without any deed of assignment.

By the operation of these statutes, the future property of the bankrupt, after a second certificate, becomes vested in the assignees by the mere appointment, in the same way as future property, acquired after the assignment and before a certificate. But under the prior statutes, and by virtue of the construction put upon them by the Courts, the assignment in like manner vested property acquired before the certificate in the assignees.

Under stat. 34 & 35 *Hen.* 8, c. 4, s. 1, the Lord Chancellor, &c. might order the bankrupt's goods and debts to be assigned to creditors. This was followed by stat. 13 *Eliz.* c. 7, s. 2, which directs an assignment by deed, and section 11 of which directs that lands and goods, acquired before the creditors are paid, shall be bargained, sold, delivered and *used* for the payment of creditors, in the same way as other lands and goods which he had when he was declared to be bankrupt. Then followed stat. 1 *Jac.* 1, c. 15, s. 13, which, reciting the insufficiency of the powers given to the commissioners touching debts due to bankrupts, enacts that they shall have power to grant debts, due or to be due, to the use of the creditors, and that the same grant or assignment shall so vest the property of the debt or debts in the persons to whom they are assigned, as fully

to all intents and purposes as if the contract, whereof such debts shall arise or grow, were made with the said person or persons; and the bankrupt shall afterwards have no power to recover the same; using the same language which is found almost verbatim in stat. 6 *Geo.* 4, c. 16, s. 63. Statute 5 *Ann.* c. 22, s. 4, directs the commissioners to assign to the assignees the bankrupt's estate and effects; and the clause is copied by stat. 5 *Geo.* 2, c. 30, s. 26.

The construction put upon these statutes has been, that all future property, as well as present, passed by the original assignment by the commissioners to the assignees. This was decided in the case of *Kitchen v. Bartsch* (a), in which all the authorities were reviewed.

The new Bankrupt Statute, 6 *Geo.* 4, c. 16, s. 63, appears to us only to enact in express terms, that which was law by the construction of the Courts before, viz. that the assignment conveyed future property acquired before the certificate; and, consequently, whatever right an uncertificated bankrupt had before that statute in after-acquired property, an uncertificated bankrupt has still, and a twice certificated bankrupt, where the estate does not pay 15s., is in the same position; and this was the opinion of the Court of Exchequer in *Fyson v. Chambers* (b).

The remaining question then is, what was the right of an uncertificated bankrupt to after-acquired property, before the recent statutes.

The leading case on this subject is *Fowler v. Down* (c), where it was laid down that the bankrupt has a right to such property against every body but the assignees, and that it was not competent for a stranger to dispute his title. That was an action of trover, not for goods which had been in the bankrupt's possession, but which were in the defendant's hands and transferred to the bankrupt by the owner for a valuable consideration. The case therefore was not decided on the ground that actual possession gives

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(a) 7 East, 53.

(b) 9 M. & W. 460.

(c) 1 Bos. & Pul. 44.

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a title as against a wrongdoer, but on the principle that the bankrupt had a special property, a title of his own, without actual possession. It is true that in giving judgment, Lord Chief Justice *Eyre* supposes that a new assignment to the assignees, of after-acquired property, was necessary to give them a title, which is incorrect; but that is not the sole ground on which he rests the case, nor do the other judges rely upon it. It is also to be remarked, that the case of *Ashley v. Kell* (a) was mistakenly cited by *Buller J.* (b), as being an authority for the above-mentioned position, which it is not, as it is clear, that, under stat. 5 *Geo. 2*, c. 30, the future effects of a bankrupt who has twice obtained his certificate and does not pay 15s. in the pound, do not pass to his assignees. But the point decided was expressly sanctioned by the Court of King's Bench in *Webb v. Fox* (c); and prior to these cases, Lord *Kenyon* had decided a similar point in the case of *Laroche v. Wakeman* (d), where an uncertificated bankrupt had assigned to the plaintiff, who maintained trover; and in the case of *Kitchen v. Bartsch* (e) it was considered as established. The same doctrine was held by *Gibbs C. J.* in *Cumming v. Roebuck* (f), who decided that the plaintiff, an uncertificated bankrupt, could sue for the non-acceptance of goods under a contract with him, if the assignees did not interfere; for he considered he might sue as their trustee. In *Ex parte Cartwright* (g), Lord *Eldon* treated the doctrine as fully established; so much so, that he seems to have thought a commission might be supported on his petition, if the assignees did not interfere. And, finally, in *Drayton v. Dale* (h), all the judges of the King's Bench recognised this principle, though some of them put the case also on the ground of estoppel.

(a) 2 Str. 1207.

(b) In *Fowler v. Down*, 1 B. & P. 48.

(c) 7 T. R. 391.

(d) 1 Peake's N. P. C. 140.

(e) 7 T. R. 391.

(f) Holt's N. P. C. 172.

(g) 2 Rose's Ca. Ba. 230.

(h) 2 B. & C. 293. See *Chipendale v. Tomlinson*, 1 Cooke's B. Laws, 428 (8th ed.).

Such are the authorities in favour of the right of an uncertificated bankrupt against all but his assignees; and certainly this has been treated as a well known principle, in this branch of law, perfectly well established for a long series of years. On the other side, the case of *Young v. Rishworth* (a) is cited, and was that on which the Court of Queen's Bench relied in the decision of the present case. There the Court decided that section 127 of stat. 6 Geo. 4, c. 16, was retrospective, so as to operate on a bankrupt who had obtained one certificate before the statute, a point to which the principal attention of the Court was directed; but they also decided that, where there was a second certificate, the plaintiff's bankruptcy was a bar; probably on the ground that section 127 of stat. 6 Geo. 4, c. 16, vesting the right of action in the assignees, distinguished this case from that of an action by an uncertificated bankrupt. But the reasons for that part of the judgment are not assigned. If that conjecture is right, we think that ground is untenable, as we have before given our opinion, that the rights of the bankrupt are the same in both cases. In the Court of Exchequer, on the argument of *Fyson v. Chambers* (b), and on the argument of this case before us, it was suggested that *Young v. Rishworth* (a) was distinguishable, because it was not averred in the plea that the money sought to be recovered was after-acquired property; and also that the plea was *primâ facie* an answer, and that if the assignees had permitted the bankrupt to act on their behalf, such fact ought to have been replied; and that the case may be supposed to have been decided on one or both of these grounds. Upon consideration, we think that it cannot be supported upon either; but that not only the weight of authority, but reason and convenience, are in favour of the right of the bankrupt to sue.

All future property and contracts vest in the assignees, by the words of stat. 6 Geo. 4, c. 16, ss. 63, 127, and by

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the construction put by the Courts on the words of the older statutes. But there must be property in the *bankrupt* or *contracts with him* before such property or contracts can vest in the assignees. The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for such an instant only, or to give the assignees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute, and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purposes, and for all other debts due to the uncertificated bankrupt, would be invalidated. The legislature, by several statutes, have protected all payments by and to, and all dealings and transactions with the bankrupt, *bonâ fide* made or entered into without notice of the bankruptcy before the fiat; but there is no provision by the statute law for such payments, dealings or transactions, *after* the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property and contracts for the assignees, who may, whenever they please, disaffirm his act, but until they do so, his acts are all valid. If then an uncertificated bankrupt contracts on behalf of and for the benefit of his assignees, it is perfectly clear that he may sue on such contracts in his own name; and it is no plea that the property is vested in, or the contract made for, the benefit of the assignees, unless it contains an averment that they have interfered, and desired the defendant to pay to them, any more than it would be a defence to an action by a factor, broker, or agent for another, to plead that the property belonged to, or the contract was made by the plaintiff, for his principal. Such a plea, to be a good

answer, must aver that the principal has interfered, or disclose some other ground of defence.

We think, therefore, for the reasons which, on account of the great importance of the case, we have given at some length, the plea is bad for not stating, as was done in that in *Kitchen v. Bartsch* (a), that the assignees had interfered and required the defendant to pay to them, and we all think that the judgment must be reversed, and judgment given for the plaintiff on the demurrer to the last plea.

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Judgment reversed.

(a) 7 East, 53.

The QUEEN v. DUNN and BENNETT.

Wednesday,  
May 8th.

IN Trinity Term last (June 10) a rule calling upon the town council of Lichfield to shew cause why a certiorari should not issue to remove two orders, directing certain payments to be made out of the funds of that borough, was made absolute (b).

Where an order for payment of money out of a borough fund is brought up by certiorari, under 7 Will. 4 & 1 Vict. c. 78, s. 44, and quashed with costs, the Court should decide, when the quashing is ordered, who is to be charged with the costs as "prosecutor" of the order, and the name of such party

In Michaelmas Term last (Nov. 18) a rule, calling upon "the prosecutors" to shew cause why the orders above mentioned should not be quashed, "with costs to be paid by the prosecutors to the defendants or their attorney," was made absolute, no cause being shewn.

In Hilary Term last a rule was obtained, calling upon *Charles Simpson*, and thirteen others, to shew cause why writs of attachment should not issue against them for their

(b) See the case reported *ante*, p. 491.

should be inserted with the rule.

Where this practice had not been followed, and a rule for quashing such orders was merely drawn up with costs "to be paid by the prosecutors," without naming them, the Court refused, on motion by the party who had obtained the rule for quashing, to issue attachment against certain persons who had made affidavits in opposition to the certiorari, and placed themselves, according to the argument of the party moving, in the position of "prosecutors" of the orders quashed.



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contempt in not paying the above costs, pursuant to the last mentioned rule, and allocatur thereon. .

The rule for an attachment was drawn up on reading the affidavit of *Alfred Egginton*, as attorney of the above named defendants (*Dunn* and *Bennett*), stating that the rule of Michaelmas Term last and the allocatur had been served upon the fourteen persons who were called upon to shew cause against the attachment, and who were called "the prosecutors" in the affidavit, and also upon reading affidavits made by the said fourteen persons and others in Trinity Term last, in opposition to the rule nisi for the certiorari.

In opposition to this rule, *Simpson* stated that he never had been a member of the borough council, but was only the town clerk and solicitor to the corporation and council. That at a quarterly meeting of the council on the 8th May last, it was resolved by the council in their official capacity, on behalf of the corporation, that the deponent as such town clerk and solicitor should adopt the necessary proceedings to shew cause against the rule nisi for the certiorari; and that the common seal was duly affixed to a copy of the resolution; in pursuance of which he had caused affidavits to be prepared and counsel to be instructed against that rule; and that counsel did appear accordingly on behalf of the council in their collective official capacity. Some of the remaining thirteen persons against whom this rule nisi for an attachment had issued, deposed that they had never acted in the making of the orders of council except officially, and that they had never instructed counsel against the rule except officially and in the council's behalf, and that if compelled to pay the costs personally they were not aware of any means whereby they might recover the amount from the corporation or from the town council, unless through the interposition of this Court, making an order on the council to pay out of the borough fund. The other parties selected as prosecutors made affidavit to a similar or nearly similar effect; one deposed that he was not a member of the council at the time when the order

was made. And several of the deponents also stated that Mr. *Egginton*, the solicitor of Messrs. *Dunn* and *Bennett* as aforesaid, well knew at the time when he made his affidavit in support of the rule nisi that none of them were individually the prosecutors, but that the council of the city, acting on behalf of the body corporate of the city, were the only prosecutors, and that Mr. *Dunn* was a councillor and had attended meetings of the council.

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*Erle* and *W. R. Cole* now shewed cause on behalf of *Simpson* and seven other defendants, Sir *F. Thesiger* S. G. for the other six. The applicants proceeding under 7 Will. 4 and 1 Vict. c. 78, s. 44, cannot treat these individuals as prosecutors, that is, as the parties who sought to enforce the orders quashed on certiorari, the only substantial ground shewn being that they joined in affidavits against the rule. The party which really sought to enforce the order, as well as contested the rule, was the town council representing the corporation, and if the town council have improperly incurred costs they may be called on to pay them as a body. [*Patteson* J. The town council is not a corporation, and it would seem to follow from this argument, that where a person interested in the borough fund, like the defendants *Dunn* and *Bennett*, obtains a certiorari, and causes orders by which the fund has been misapplied to be quashed, the borough fund must pay the costs incurred through such misapplication.] At all events, parties are joined here who were not even members of the council when the orders were made; and to select persons as prosecutors merely because they joined in affidavits against the rule, is in reality nothing but to select them arbitrarily. If the result is, that the parties obtaining the certiorari have to pay their own costs, that cannot be remedied, the prosecutors not having been properly ascertained. Restitution of the money cannot be ordered: *Reg. v. The Mayor, &c. of Bridgewater* (a), *Reg. v. Paramore* (b).

(a) 10 A. & E. 281; S. C. 2 P. & D. 558. (b) 10 A. & E. 286.

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*F. V. Lee* contra. It is true that no person is expressly pointed out as liable for costs by 7 *Will.* 4 and 1 *Vict. c.* 78, s. 44. But they are left to the "judgment" and "discretion" of the Court, and will, therefore, be awarded according to the view which the Court takes of the concern which individuals have taken in procuring the orders complained of, and resisting the attempt to invalidate them; this will appear by the affidavits, and the Court has often ordered costs to be paid by persons whose liabilities appeared on the affidavits. [Lord *Denman* C. J. referred to *Reg. v. Greene* (a), as containing the established practice.] In this case, the majority of the council who made the order complained of are justly saddled with the costs to which they are liable personally, if at all; for the council, not being a corporation, cannot be made collectively a prosecutor for this purpose.

LORD DENMAN C. J.—It is to be regretted that the practice of the Crown Office was not brought to the notice of the Court at an earlier stage of these proceedings. That practice appears to be, that where no prosecutor appears in a sufficiently definite character on the face of the proceedings, the Court should decide who should be deemed the prosecutor. It could not be admissible, that the party moving to quash the orders should select whom he pleased to fix with the costs of opposition. The oversight cannot now be remedied.

PATTESON J.—There is considerable difficulty in the application of this act of parliament to particular cases. We ought to have exercised the discretion which it gives us at the time when we directed the orders to be quashed, but our attention was not then called to the point. And now we are desired to impose the payment on parties, not selected by ourselves in our judgment and discretion, but, in point of fact, arbitrarily chosen by the successful party.

WILLIAMS J.—Generally speaking, the party opposing a rule is the party liable for costs when the rule is successfully maintained. But it does not appear in the present case who that party was; a difficulty which might have been got over, had the party who made the rule absolute directed our attention at the time to the circumstances on which our judgment was to depend, but which cannot be got over now by his merely selecting certain individuals.

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WIGHTMAN J. concurred.

Rule discharged.

The QUEEN v. KING, EMILY A. BIRCH, ANNA D.

PHILLIPS and AUGUSTA ANN BIRCH.

Tuesday,  
May 7th.

THIS was an indictment at the Central Criminal Court for conspiracy. *Semble*, that an indictment charging the defendants with conspiring together to cheat and defraud certain subjects of the Queen, being tradesmen, of goods and chattels, is sufficient, without naming the tradesmen, or alleging overt acts.

The indictment stated that *William Henry King, Emily Ann Birch, Anna Dorcas Phillips, and Augusta Ann Birch*, on the 1st day of November in the fifth year, &c., with force and arms at, &c., did unlawfully combine, conspire, confederate and agree together, to cheat and defraud certain liege subjects of our Lady the Queen, being tradesmen, of divers large quantities of their goods and chattels. That the said *Emily Ann Birch* afterwards, to wit, on the day and year aforesaid, at, &c., did in pursuance of the said

An indictment, after charging as above, proceeded to allege that *A.*, one of the defendants, in pursuance of the conspiracy, fraudulently obtained on credit goods from certain tradesmen (named) and other tradesmen whose names are unknown; that *A.*, in further pursuance of the conspiracy, procured these goods to be delivered at her house; that they were not paid for; that the defendants, in further pursuance of the conspiracy, pretended that certain fictitious debts were due from *A.* to the other defendants respectively, and caused actions to be commenced and judgments obtained, and writs of *fi. fa.* issued, by virtue of which the goods so obtained were taken in execution to satisfy the fictitious debts, and that the defendants did in this manner unlawfully cheat and defraud the before-mentioned tradesmen. *Held*, that if the charging part had been insufficient, the overt acts thus stated would have supported it, and that the concluding allegation was not a statement of a separate offence (obtaining goods by fraudulent pretences), but an unnecessary summing up of the facts stated as overt acts.

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conspiracy fraudulently order and obtain upon credit from *William Ayscough Wilkinson* and *Charles Wilkinson*, upholsterers in the city of London, divers goods and chattels of great value, to wit, of the value of 500*l.*, of and belonging to the said *William Ayscough Wilkinson* and *Charles Wilkinson*; from *Frank Braithwaite* and *William Jones*, silversmiths, of Westminster, divers goods and chattels of great value, to wit, of the value of 500*l.*, of and belonging to the said *Frank Braithwaite* and *William Jones*; from *John White* and *Charles White*, wine merchants, of London aforesaid, divers goods and chattels of great value, to wit, of the value of 500*l.*, of and belonging to the said *John White* and *Charles White*; from *Charles Town* and *Emmanuel Emmanuel*, silversmiths, of Westminster aforesaid, divers goods and chattels of great value, to wit, of the value of 500*l.*, of and belonging to the said *Charles Town* and *Emmanuel Emmanuel*; and from divers other tradesmen, the liege subjects of our Lady the Queen, whose names are to the jurors unknown, divers other goods and chattels of great value, to wit, of the value of 2000*l.*, of and belonging to the said last mentioned subjects of our said Lady the Queen respectively. That the said *Emily Ann Birch* then and there did, in further pursuance of the said conspiracy, and in order that the said goods and chattels might be taken in execution, and sold as hereinafter mentioned, order and direct that the said goods and chattels, so fraudulently obtained on credit as aforesaid, should be delivered by the said several tradesmen respectively at the house of the said *Emily Ann Birch* in Bedford Place, Russell Square, in the county of Middlesex aforesaid, and that the said goods and chattels were so delivered at the said house, in accordance with the said order and direction. And that no payment, remuneration or satisfaction for the said goods and chattels was at the time of such delivery or at any other time made by or on behalf of the said *Emily Ann Birch*, *William Henry King*, *Anna Dorcas Phillips*, and *Augusta Ann Birch*, or by or on behalf of any or either of them, to the said several tradesmen hereinbefore

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mentioned, or to the said several tradesmen hereinbefore mentioned whose names as aforesaid are to the jurors unknown, or to any or either of them, or to any other persons or person authorised by them or any or either of them to receive the same. That in further pursuance of the said conspiracy, and in order that the said goods and chattels might be taken in execution and sold as hereinafter mentioned, the said *Emily Ann Birch* did then and there, and within the jurisdiction aforesaid, allow and procure the said goods and chattels so delivered as aforesaid to continue and be in her said house until they were taken in execution as hereinafter mentioned. That afterwards, to wit, on the day and year aforesaid, at, &c., the said *Emily Ann Birch*, *William Henry King*, and *Anna Dorcas Phillips*, in further pursuance of the said conspiracy, did falsely and fraudulently pretend that certain debts were due and owing from the said *Emily Ann Birch* to the said *William Henry King* and *Anna Dorcas Phillips* respectively, to wit, a fictitious debt of 2145*l.* 11*s.* 6*d.*, pretended to be due and owing from the said *Emily Ann Birch* to the said *William Henry King*, and a fictitious debt of 514*l.* 16*s.*, pretended to be due and owing from the said *Emily Ann Birch* to the said *Anna Dorcas Phillips*; and that then and there the said *William Henry King* and *Anna Dorcas Phillips* did, in further pursuance of the said conspiracy, and in order to obtain payment of such false and fictitious debts, commence and cause to be commenced respectively, by collusion with the said *Emily Ann Birch*, separate actions at law against the said *Emily Ann Birch* in her Majesty's Court of Queen's Bench at Westminster, and in her Majesty's Court of Common Pleas at Westminster. And that afterwards, to wit, on the 28th day of February, 1842, in further pursuance of the said conspiracy, to wit, &c., judgments were collusively signed, and caused to be signed, by the said *William Henry King* and *Anna Dorcas Phillips* respectively, in each of the said actions, for want of a plea. That afterwards, to wit, on the 1st March in the year last aforesaid,

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in further pursuance of the said conspiracy, to wit, at, &c., certain writs of *fi. fa.* were collusively sued out and caused to be sued out by the said *William Henry King* and *Anna Dorcas Phillips* upon the respective judgments so obtained by collusion as aforesaid, by virtue of which writs the said goods and chattels, so fraudulently obtained as aforesaid from the said several tradesmen before mentioned, and the said several tradesmen whose names as aforesaid are to the jurors unknown, were at, &c., on the day and year last aforesaid, and before the expiration of the said respective times of credit, taken in execution and sold in due course of law, in order to satisfy the fictitious debts falsely and fraudulently alleged to be due and owing from the said *Emily Ann Birch* to the said *William Henry King* and *Anna Dorcas Phillips* respectively. And so the jurors aforesaid, upon their oath aforesaid, find that the said *William Henry King*, *Emily Ann Birch*, and *Anna Dorcas Phillips*, at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, in manner and by the means aforesaid, unlawfully did cheat and defraud the said *William Ayscough Wilkinson* and *Charles Wilkinson*, the said *Frank Braithwaite* and *William Jones*, the said *John White* and *Charles White*, the said *Charles Town* and *Emmanuel Emmanuel*, and the said other tradesmen, liege subjects of our Lady the Queen, who supplied the said goods and chattels as aforesaid, but whose names are to the jurors unknown respectively, of the said goods and chattels, to the great damage of the said several persons so supplying the said goods as aforesaid, to the evil example of all others in like case offending, &c. There were other counts, which are not here reported.

The indictment was removed by *certiorari* into this Court, and tried before *Williams J.* at the *Middlesex* Sittings after Hilary Term, 1844. The defendants *King* and *Emily Ann Birch* were convicted on the above count, and judgment pronounced.

In this term (April 18), *Godson* obtained a rule on the

part of *E. A. Birch*, and *Pashley* on the part of *King*, to shew cause why the judgment pronounced upon the defendants should not be amended by arresting the judgment, on the ground that the count was bad.

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*Humfrey* and *M. Chambers* now shewed cause. The statement of the overt acts was not necessary; the indictment was sufficient without them, inasmuch as the conspiracy stated in it was a conspiracy to do illegal acts, and it is not necessary to set out the means; *Rex v. Gill* (a), *Rex v. Seward* (b), *Reg. v. Biers* (c), *Reg. v. Kenrick* (d). Nor is the statement of the persons to be defrauded as tradesmen; without naming them, too large; *Rex v. De Berenger* (e), *Peck v. Reg.* (f). But if this was otherwise, the statement of the overt acts is here sufficient to cure the defect, *Rex v. Spragg* (g), where Lord *Mansfield* refers to the overt act laid, viz. an indictment preferred against the prosecutor, to shew that the charge was of a "complete formed conspiracy, actually carried into execution." *Reg. v. Parker and others* (h) is distinguishable, for the judgment there was arrested on the ground that there was no statement to whom the goods and chattels which the defendants conspired to obtain belonged.

*Kelly* and *Pashley* for *King*, and *Godson* and *Hood* for *Birch*, contra. The names of the tradesmen should have been given, or it should have appeared that their names were unknown; *Hawkins*, P. C. b. 2, c. 25, 1 *Starkies' Crim. Pl.* 70; *Reg. v. Biss* (i). The statement of the overt acts is altogether incomplete. It does not appear that the

(a) 2 B. & Ald. 204.

(f) 9 Ad. & Ell. 686; S. C. 1

(b) 1 Ad. & Ell. 706; S. C. 3  
 N. & M. 557.

P. & D. 508.

(g) 2 Burr. 993.

(c) 1 Ad. & Ell. 327.

(h) 3 Q. B. 292; S. C. 2 G. &

(d) 5 Q. B. 49; S. C. 1 D. &

D. 709.

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(i) 8 C. & P. 773.

(e) 3 M. & S. 67.



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tradesmen named in the beginning of that part of the count are the same with those whom the defendants are charged with conspiring to defraud; and the acts themselves, taken severally or jointly, have no illegal or fraudulent character. [*Patteson J.* They are stated to be done in furtherance of a conspiracy.] The count is also bad for duplicity, for the last part of it imports a charge of obtaining money under false pretences.

Lord DENMAN C. J.—That an indictment in this general form is good, was expressly decided in *Rex v. Gill* (a), and the reason plainly is, that no person could with truth be specified by name as intended to be cheated, there having been, in the formation of the conspiracy, no particular individuals in view as its subjects, but a plan having been laid to entrap all who might be brought within the reach of it. The first part of this count might, therefore, probably be good if it stood alone. If not, it is helped by the statement of the overt acts. That statement appears to me sufficient. It is said that these acts in themselves are or may be innocent. That may be the case; but they are laid as being done in furtherance of a conspiracy, which conveys a criminal character to the whole, and is charged in the introductory part of the count. The statement that *Birch* bought goods on credit, and so forth, is an information to the defendants of the means which they are charged with using to carry on the conspiracy. The count is not bad for duplicity. The statement at the end does not charge a substantive offence, but it is merely a summing up (apparently unnecessary) of the results of the conspiracy.

PATTESON J.—I understand the position of *Mr. Starkie* in the passage cited, and the authorities which support it. They all relate to the case of a conspiracy to defraud one or more particular individuals. But in the case of a general conspiracy, where all mankind are intended to be defrauded,

(a) 2 B. & Ald. 204.

the rule does not apply; *Rex v. De Berenger* (a). There it was impossible that the names could be mentioned, and that is equally the case here. I have, therefore, no doubt that the indictment would have been good, if it had stopped at the charging part, without mentioning any names at all, and (as in *Rex v. Gill* (b)) without alleging any overt acts. And the objection rather resolves itself into the indictment being inconsistent; that it commences as a charge of conspiracy, and ends as one of fraudulently obtaining goods by false pretences. But that is not the real meaning of the indictment. It is not alleged that the defendants used false pretences to those from whom they obtained the goods, and so obtained them. The mode of the fraud is this; the defendant *Birch* obtains goods of certain parties by purchasing them on credit, in order that they might be taken and sold under a false pretence of a lawful debt by the other defendant, for which goods nothing was ever paid. These acts, taken together, unquestionably amount to cheating and defrauding in pursuance of the conspiracy formed for that purpose, and the overt acts must be viewed together and in this light, not as insulated.

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WILLIAMS J.—I am of the same opinion. The case has been argued for the defendants as if the overt acts constituted the offence, and not the conspiracy. I think the conspiracy sufficiently stated in the charging part, but if not, sufficiently particularized by the overt acts. The argument for the defendants as to these appeared to proceed on the assumption that each overt act must in itself be criminal; but that is not the intention with which they are alleged. They are the acts to be given in evidence to support the substantive charge, that of conspiracy; and for this purpose, taken together, they are amply sufficient.

Rule discharged.

(a) 3 M. & S. 67.

(b) 2 B. & Ald. 204.

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A citation against a parishioner, charging him with that he "wilfully and contumaciously obstructed, or at least refused to make or join or concur in the making of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church" does not contain a sufficient allegation of an offence cognisable by an Ecclesiastical Court.

Where the parishioner had appeared under protest to such a citation, and, his protest having been overruled, had been ordered to appear absolutely, a declaration in prohibition held good on demurrer, on the ground that the citation was insufficient to give jurisdiction, and the application not premature.

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**PROHIBITION.** The declaration stated that defendant caused a citation to be issued against the plaintiff in prohibition, to wit, on 19th November, 1842, out of the Arches Court of Canterbury, addressed to all and singular clerks, &c. in the diocese of Canterbury, reciting the following letters of request from the official principal of the Episcopal Consistorial Court of Norwich, addressed to Sir *H. J. Fust*, official principal of the Arches Court of Canterbury. The letters were as follows:—"Whereas *Edward Steward*, of the city of Norwich, gentleman, is desirous of instituting a certain cause or business of promoting the office of the judge against *John Francis*, a parishioner and inhabitant of the parish of St. George of Colegate, situate and being within the said city and diocese of Norwich and province of Canterbury, and of calling upon him the said *J. Francis* to answer to certain articles or positions to be objected to him, touching and concerning his soul's health, and the lawful correction and reformation of his errors and excesses, particularly in respect of his having wilfully and contumaciously obstructed, or, at least, refused to make or join or concur in the making of a sufficient levy, rate or assessment for providing funds in order to defray the expense of the necessary repairs of the parish church (including the chancel which, by the custom of Norwich, the parishioners are bound to repair,) of the said parish of St. George of Colegate, within the said city and diocese of Norwich, and whereas difficulties may arise wherein the parties may require the aid and advice of civilians," &c. After reciting intermediate proceedings, the declaration stated that a citation issued under seal of the Arches Court against *Francis* to appear to answer the articles above mentioned in a cause or business of promoting the office of the judge by *Steward* against *Francis*, &c. The declaration set out the rest of the citation; stated

that *Francis* was served with it, and appeared in the Arches Court by his proctor under protest, and that the proctor in a certain act on petition duly exhibited alleged as follows:—That the said *Francis* was unlawfully and wrongfully cited in manner and form and to the effect aforesaid, by reason that it did not appear by the said citation that the now plaintiff had been guilty of or was charged with any ecclesiastical offence cognisable by the said Court or any other ecclesiastical Court in the premises. That by the said citation it did not appear that the said parish church of St. George of Colegate ever was or then was in want of any repairs whatever, or that any vestry for making any rate to defray the expense of any such repairs had been duly or at all called or held, or that the now plaintiff was ever present in any vestry in the said parish, when such rate or any rate for the repair of the said church was ever proposed or considered, or that he ever took any part whatever in the proceedings of any such vestry. That it was not competent for any person to promote the office of the judge, or otherwise to proceed criminally against any one or more individual parishioners or inhabitants of a parish for or in respect of the acts, matters or things charged or alleged against the now plaintiff in the said citation. And that the now plaintiff was not bound to appear in the said cause or business to the said citation. And therefore the said *W. Pritchard* prayed the judge of the Arches Court to pronounce for such his protest, to dismiss the now plaintiff and his party from the said suit and all further observance of justice therein, and to condemn the now defendant in costs. The declaration further stated that *Thomas Blake*, the proctor for the now defendant, alleged in reply, that it did appear by the said citation that the now plaintiff was chargeable with an ecclesiastical offence cognisable by the said Court, and, therefore, the said *T. B.*, denying relevancy, &c. prayed the judge of the said Court to overrule the protest, and assign the said *W.*

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*Pritchard* to appear absolutely for the now plaintiff, and to condemn the now plaintiff in the costs of such protest. That the cause was heard and judgment pronounced by Sir *H. J. Fust* on February 8, 1843, overruling the protest, and assigning the proctor to appear absolutely for *Francis*. The declaration then alleged that the defendant and the said Sir *H. J. Fust* were about to proceed to compel the now plaintiff to appear absolutely, and prayed a prohibition. Demurrer and joinder.

The demurrer was argued Hilary Term, 1844, by

Sir *F. Thesiger* S. G. for the defendant. He contended that the application was premature, and that the plaintiff should have waited for the articles, referring to the cause of *Steward v. Francis* in the Arches Court (*a*); as to the main point he cited *Veley v. Burder* (*b*), *Reg. v. Baines* (*c*), *Taylor v. Clemson* (*d*), *Cooper v. Wickham* (*e*), *Greenwood v. Greaves* (*f*).

*Roebuck* contra, cited *Reg. v. Sneller* (*g*), *Rex v. Fowler* (*h*), *Millar v. Palmer* (*i*), *Brecks v. Woolfrey* (*k*), *Bushell's case* (*l*), and referred to the precedents of monitions in *Archdeacon Hale's Precedents in Causes of Offices*, &c. (1841), and the remarks on them of Dr. *Lushington* in *Veley v. Gosling* (*m*).

Sir *F. Thesiger* S. G. in reply.

*Cur. adv. vult.*

(*a*) 3 *Curtis*, 209, 213, 216.

(*b*) 12 *A. & E.* 210; *S. C.* 4 *P. & D.* 475.

(*c*) 12 *A. & E.* 265, 303; *S. C.* 4 *P. & D.* 309.

(*d*) 2 *Q. B.* 978, 1031; *S. C.* 2 *G. & D.* 346.

(*e*) 2 *Curtis*, 303.

(*f*) 4 *Hagg. Ecc. Rep.* 77.

(*g*) 1 *Vern.* 24; 10 *Vin. Ab.* 521, tit. *Excommunication*, E. pl. 21, 22, 23.

(*h*) 1 *Salk.* 293.

(*i*) 1 *Curtis*, 540.

(*k*) 1 *Curtis*, 880.

(*l*) *Vaugh.* 135.

(*m*) 3 *Curt.* 253, 285—287.

Lord DENMAN C. J. now delivered the judgment of the Court.—The declaration in prohibition sets forth a citation from the Dean of the Arches, founded on letters of request from the Consistory Court of the Bishop of Norwich, in a suit against the plaintiff touching his soul's health, and for correction of his errors and excesses, particularly in respect of his having wilfully and contumaciously obstructed, or at least refused to make or join or concur in the making of a sufficient levy, rate, or assessment for providing funds in order to defray the expense of the necessary repairs of his parish church.

The declaration alleged, that by the said citation plaintiff was not charged with any ecclesiastical offence cognisable by any Ecclesiastical Court.


A general demurrer to this declaration has been argued before us.

No question was made, whether a citation must not contain the charge of an ecclesiastical offence. In the ancient constitutions a remedy is applied to many abuses of process by citing persons out of the jurisdiction wherein they reside, and finally the act of *Hen. 8* (commonly called the Bill of Citations,) was passed to prevent this great and frequent oppression, whereby persons often found themselves excommunicated and ruined, without notice of the proceedings against them. But it is constantly assumed that they set forth on the face of them a spiritual offence.

Many such offences were well known by their proper descriptions, heresy, incontinence, brawling, subtraction of the various kinds of ecclesiastical dues, &c.

It was not urged that there can be no offence where the acts charged are incapable of technical designation, but that, if the offence consist of special circumstances, these should appear on the citation; not unlike the proceedings of our own Courts, where writs were provided in common form for known causes of action, but an action on the case might be founded on special facts, converting what might

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have been innocent in itself into an injury to the party complaining, and a writ was framed for the occasion.

The Solicitor General maintained that the words of charge, which I have just read from the citation, impute a spiritual offence. Not denying the right of every parishioner to refuse to make or join or concur in making a church rate, nor even the right to vote against the imposition of a rate, he still urged that to do either "wilfully and contumaciously" is a spiritual offence, and that the wilfulness and mode of refusing, and the accompanying acts inferring that contumacy which thus became the essence of it, need not be further particularized in the citation, but may be introduced for the first time to the knowledge of the accused as evidence in support of the charge.

In the proceedings of any Court where an accusation is preferred, the minimum of allegation is the maximum required in proof; the prosecutor in several counts (as the charges in the præsertim are called by learned ecclesiastical judges) must be entitled to succeed, if he establish any one of them, and, consequently, if this citation is good the present plaintiff will incur spiritual censures, though convicted of no other fact than that of a refusal to join in making a church rate.

We are by no means satisfied that the refusal to join in making a church rate can be an offence in a parishioner, because it cannot be necessary for all the parishioners to join in making it. A majority may do this act, and if it is done, what offence can there be in refusing to concur in it? If no rate is made, it can hardly be conceived that default should be produced by the refusal of a single parishioner to concur in imposing one.

If he indeed does any thing for the purpose of defeating the measure, if he is guilty of any violence or fraud, if he bribes or intimidates other men from voting for a rate, if he deceives parishioners as to the time or place of meeting, if he persuades others to absent themselves, or even absents himself (according to one supposition made at the bar,) in

order to prevent a regular assemblage, these may be criminal acts, but they are not the refusal of a church rate, nor evidence of such refusal; they are wholly independent of the mere refusal, and are capable of being distinctly stated.

But further, the sufficiency of this charge in its more cogent terms, that the plaintiff "wilfully obstructed the making of a church rate," may well be questioned. It might be the duty of a parishioner wilfully to obstruct it. A parish meeting being convened to consider of granting such rate (though even that is not stated in the present citation), the parishioners go to the meeting to take part in its deliberations, and exercise their judgment on the question raised. Must they not exercise it with freedom? Are they bound to vote one way? On the contrary, the law permits them to object to the grant proposed, to argue that it ought not to be made, to vote for refusing it. Persons so acting may be truly said to wilfully obstruct the making of a rate; that phrase would be generally supposed to point at similar proceedings, yet they are all undoubtedly lawful. Each member of this deliberative assembly may be bound by every principle to take the part now supposed. Can he be treated as a criminal in any English Court for the performance of this acknowledged duty?

There is an answer indeed to this and every other objection, which sweeps them all away. The acts of plaintiff, denounced in the citation, are therein alleged to have been both wilfully and contumaciously done. Now, the first of these two words adds nothing to the charge of refusing: all refusal is wilful. It may be doubtless a word of great force when connected with acts of obstruction, for these may be unconsciously done by a person ignorant of their tendency, and can never be criminal without the knowledge of it.

Can then a wilful refusal, possibly an act of duty and perfectly innocent, be transmuted by the mere addition of a reproachful term into a crime? It conveys no idea to the hearer's mind, but that the speaker disapproves or

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resents the conduct to which he applies it. He may, perhaps, deem that conduct in itself contumacious, or may consider it as deserving the epithet from other facts antecedent or contemporaneous. Can any thing be more easy than to describe these facts, or more dangerous than to treat another as a criminal without informing him how he is supposed to have become so? Our own forms of indictment and declaration have been constantly held defective, where, the facts averred falling short of the legal definition, an attempt has been made to eke it out by adverbs either vituperative or commendatory.

The Courts refuse to infer guilt from them on the one hand, or a due course of legal proceeding within lawful jurisdiction on the other. Nor is this strictness imposed by technical rules; it grows out of the first principles of justice.

There are however certain authorities, the decisions of the Spiritual Courts themselves, which we are bound respectfully to consider and examine. They underwent a careful and minute discussion from the eminently learned person whose judgment is now questioned. In the course of delivering that judgment he founded it on some of these authorities, and distinguished it from others which were pressed as leading to the opposite conclusion.

The case of *Greenwood v. Greaves* was formerly adjudged to be precisely in point. The report is in 4 *Hag. Eccl. Rep.* 77. Two of the churchwardens of Dewsbury cited the two other churchwardens and ten parishioners for refusing to make or concur in making a rate or assessment, or sufficient rate or assessment for the repairs of the parish church, and for the lawful and necessary expense of the churchwardens relating to the parish church and incidental to their said office. The material article set forth a regular vestry meeting to consider certain statements and estimates of the charges for the ensuing year, relative to the repair of the church, and preparing bread and wine for the holy communion, and other incidental expenses, and to make a

rate for defraying the same; that a rate or assessment was proposed according to a moderate estimate of the expenses which were lawful and necessary, notwithstanding which the parties cited "objected to and did refuse to make, or concur in making a rate to the amount necessary to defray the charges and expenses," but voted for one wholly inadequate, "and by reason thereof the necessary and legal repairs cannot be done, nor other expenses necessary for divine service be defrayed."

The Chancery Court at York rejected the articles which, on appeal, were brought before the delegates, *Bolland B.*, *Bosanquet* and *Taunton JJ.*, and *Drs. Daubney*, *Haggard* and *Curteis*. This learned tribunal dismissed the appeal with costs. Their unanimous judgment is accompanied by no statement of their reasons. But some observations are reported, which they interposed in the course of the unsuccessful argument. "There is no precise allegation that the church is out of repair." If this were necessary, this single defect was fatal to the articles, and no other required notice. The Court also said to the counsel, "the question here is as to two assessments, which sum shall be adopted. If the Court were to say that the higher estimate shall be adopted, it will then decide on the question of rate, and your own case from 1st *Mod.*(a) says that the Court cannot assess the parishioners." Here is a second death blow to the articles, and the appeal was disposed of. But the Delegates, or some or one of them, go a little further, and indicate what the articles might have alleged, and what the Court might have thought of a state of facts which had no existence. "If it had been alleged that the parishioners had contumaciously, obstinately and pertinaciously refused to make a rate, or that they would only make such a one as was manifestly collusive, there might be some ground for proceeding against them, but such a state of things is not alleged to exist in this case; there is no appearance of any wilful contumacy, either avowedly or impliedly."

(a) *Rogers v. Davenant*, 1 *Mod.* 194, 236.

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With unaffected deference to the learned judge, it might be doubted, but for his view of what fell from the Court, whether, instead of being a decision in point, these words amount to any decision at all. In the first place, they are not applied to a citation but to articles; but if they are to be considered as a form prepared by the judges, that form has not been pursued here. The words "obstinately and pertinaciously" are by no means insignificant; they approach a great deal nearer to the precise ground of accusation than the very general complaint of contumacy. We apprehend that the judges mean only to say that words of that nature are indispensable, without entering upon the question whether a pointed charge may not also be required. Whatever their inclination of opinion, it is expressed with no degree of confidence. "There *might* be *some* ground for proceeding" falls infinitely short of a declaration that the form would be sufficient. Our brother judges who composed that Court were not in the habit of deviating from their line of duty by obtruding on the world their opinions on a case not brought before them; they would not have been likely to draw up the form of a citation for future use, and no judge, however enlightened, knows how he would decide a novel point which he has not heard debated.

The only authority then in support of the judgment which we are considering appears to fail entirely. But some authority is adduced against it, the authority of the same learned judge himself. In *Cooper v. Wickham* (a) a churchwarden was cited for "having, at a vestry meeting for the purpose of a church rate, voted in favour of a resolution which declared church rates at all times bad in principle, and unjust in practice, and quite uncalled for at the present time," and adjourned the meeting for twelve months; and for having voted against a church rate duly made and seconded. The citation was not objected to, but the articles alleged that the church of Shepton Mallett was in so dilapidated a state that the rain came through the

(a) 2 Curt. 303.

roof into the body of the church, to the serious detriment and injury of the fabric and also of a valuable organ, to the great inconvenience of the minister, who, on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the desk, and of the congregation. The articles further charged that the meeting was called for imposing a church rate, and the party voted for the resolutions above mentioned, and also presided at a division where it was carried by a majority.

The learned judge held these articles insufficient. He considered them as equivalent to a charge of refusing not only the rate proposed, but of any rate whatever; but he then expressly denied that the refusal of any rate by a churchwarden was an ecclesiastical offence, observing that the Court is not to presume or conjecture any thing in a criminal proceeding. He did not enter upon the inquiry whether the churchwarden's acting in avowed furtherance of his opinion, that church rates were always "bad in principle, and particularly unjust in practice," were evidence of contumacy in the refusal, thinking the articles deficient herein, that they did not shew that the dilapidated and unroofed church continued out of repair at the time of preferring the articles.

He also remarks that it was not criminal, but might be highly proper, to consider in vestry the necessity for the repairs and the estimate of expense, which possibly may have been thought too high by the parishioners. This decision was not unreasonably pressed on Sir *H. Jenner* when the present citation was impugned before him. But in *Dr. Curteis'* Report the argument at the bar is briefly summed up, while the judgment of the Court occupies a very large space. After careful examination of these two cases, it is hard to discover any ground for excuse in that former case, which is not in the present. *Mr. Cooper* was charged with refusing to join in making any church rate. *Mr. Francis* with refusing to join in a particular rate; the

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latter being a parishioner only, the former both parishioner and churchwarden. Mr. *Cooper* was held guiltless, because the continuance of the dilapidation was not alleged; nor is it alleged against Mr. *Francis*. In Mr. *Cooper's* case the Court could not conjecture or presume that the church may not have been completely restored between the citation and the articles. Is that conjecture or presumption to be made between the vestry meeting and the citation?

Mr. *Cooper* was excused for refusing to join in making any rate, on the declared ground that church rates are always bad in principle, from a suggestion that the rate thus imposed might possibly have been thought by him higher than a fair estimate of necessary expense demanded. "I do not know" (says the learned judge) "that it is an offence in a churchwarden to vote against a rate of 2*d.* in the pound, unless that rate is shewn to be adequate and only adequate, and not excessive beyond the purpose for which it was intended to be applied." (a)

Such a vote would appear still less objectionable in a parishioner who holds no office.

If the argument of counsel had been as fully reported as the judgment, we might have then found a complete demonstration that Mr. *Francis* was entitled to the benefit of this consideration, and that it would have shewn the absence of all offence.

The citation is not in respect of a refusal to join in making any rate, but the refusal to join in making a *sufficient* rate for *necessary* repairs. The refusal to make a *sufficient* rate raises a direct implication that Mr. *Francis* was willing to join in making some rate, and that his refusal to join in one which the accuser calls sufficient, might proceed from his perfect knowledge that it was more than sufficient and excessive beyond its legitimate purpose.

This appears to be the natural meaning of the citation, and if so, it virtually calls on the Ecclesiastical Court to do what it has uniformly disclaimed the power to do,—deter-

(a) *Steward v. Francis*, 3 Curt. 223.

mine on the amount of assessment to be imposed. The epithets *sufficient* and *necessary* have possibly by some inadvertence changed places; but however placed, the word *sufficient* imports that there is no offence, until on inquiry the Court has satisfied itself that the proposed amount was not more than necessary for the sufficient reparation of the church, and that the parishioner voted against the amount proposed from some improper motive, and in violation of his real opinion. The learned judge himself observes (p. 227), that if the charge had been "for having wilfully and contumaciously obstructed," and that had been the specific offence, he should have thought the charge had not been sufficiently made out; but he adds, there is a second count, for *contumaciously refusing*, &c. There may be some difficulty in reconciling this sentence with some language in the preceding paragraphs, or with the two modes of charge in the *præsertim*, or to understand how *obstructing* can be less an offence than *refusing*, each act being supposed wilful and contumacious. But here attention must be drawn to the citation, as it appears in these pleadings (a). According to the strict rules of criticism, at least of legal criticism, as applied to instruments which ought to shew criminal jurisdiction, the words "wilfully and contumaciously" would appear to be confined to the obstruction, and by no means necessarily connected with the refusal. But if they were, we must examine the force of the word *contumaciously*. To an argument at the bar, that there can be no contumacy without a monition, a previous monition, *monitione præmissâ*, the learned judge gives this answer, "It is said that a person cannot be contumacious unless there has been a monition issued against him which has been disobeyed, and perhaps that has been correctly argued. What then? The words 'contumaciously obstruct' import that there has been a monition, for if contumacy consist in disobeying a legal order, it follows from the use of the word 'contumacy,' that there has been

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(a) *Ante*, p. 78.

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such an order (a)." If the whole train of circumstances necessary to make out an offence must be inferred from the use of a word which would be inapplicable unless those circumstances existed, the art of criminal pleading in all our Courts will be reduced within very narrow limits indeed.

"I have also been told" (the learned judge continued) "that a party should be excommunicated, that being the extent to which the Court can proceed, in order to compel a parishioner to provide the necessary means of repairing the church, and that this cannot be done *sine monitione*. Be it so. If no monition is issued, then the Court will not proceed, if that be the law, to excommunicate the party. But it is possible that a monition may have issued, and then the party may be liable to be excommunicated; or if there *has been no* preceding monition, then the party may have a monition issued against him in the course of these proceedings (b)."

If it is here meant that a charge of contumacy in the citation may be established by proof of acting inconsistently with a monition issued afterwards, we can neither assent to such a proposition, nor easily believe that it emanated from the learned judge. It seems much more probably a misconception in the reporter, or an erratum of the printer.

Upon the whole, we think ourselves bound to pronounce the citation bad as describing no spiritual offence, and we think it much better for the party to apply for a prohibition in the first stage, than after expense incurred.

Judgment for plaintiff.

(a) 3 Curt. 226.

(b) 3 Curt. 227.



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The QUEEN v. FEARGUS O'CONNOR and others. (a)

**CONSPIRACY.** The indictment was removed into this Court by certiorari. At the Lancaster Spring Assizes, 1843, it was tried before *Rolfe* B, when some of the defendants were convicted on the fourth and fifth counts, and some (among whom was *O'Connor*) on the fifth only.

Fourth count. "County Palatine of Lancaster, to wit. And the jurors, &c. upon their oath, &c. do further present, that heretofore, to wit, on the 1st August, in the year aforesaid, and on divers other days and times, between that day and the 1st of October, in the year aforesaid, and at *divers places*, divers evil-disposed persons unlawfully and tumultuously assembled together, and by violence, threats and intimidations, to divers other persons, being then peaceable subjects of this realm, forced the said last mentioned subjects to leave their occupations and employments, and thereby impeded and stopped the labour employed in the lawful and peaceable carrying on by divers large numbers of the subjects of this realm of certain trades, manufactures and businesses, and thereby caused great confusion, terror and alarm, in the minds of the peaceable subjects of this realm; and that afterwards, on the 1st August in the year aforesaid, and on divers other days and times between that day and the 1st of October in the year aforesaid, at the parish aforesaid, in the county aforesaid, the said defendants, &c., together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, did unlawfully aid, abet, assist, comfort, support and encourage the said evil-disposed persons in this count first mentioned to continue and persist in the said unlawful assemblings, threats,

A count in an indictment for a misdemeanor, with a statement of venue in the margin, charging, without any other statement of place, that the defendants, together with divers evil-disposed persons, unlawfully endeavoured to excite her Majesty's subjects to disaffection, &c.:—*Held* bad, in arrest of judgment, for want of statement of venue in the body of the indictment; the defect not being cured by 7 *Geo.* 4, c. 64, s. 20.

Another count, with a statement of venue in the margin, stated that certain persons (without any statement of place) unlawfully and tumultuously assembled, &c.; and that the defendants (with a statement of place)

(a) Decided in Trin. Term, 1843 (June 7).

did "unlawfully aid, abet, comfort, support and encourage the said persons to continue such unlawful assemblies."

*Semble*, that such count would have been bad at common law for want of statement of venue; but *held*, in this instance, to be the "want of a proper or perfect venue," and therefore cured by 7 *Geo.* 4, c. 64, s. 20.



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intimidations and violence, the said impeding and stopping of the labour employed in the said trades, manufactures and businesses, with intent thereby to cause terror and alarm in the minds of the peaceable subjects of this realm, and by means of such terror and alarm violently and unlawfully to cause and procure certain great changes to be made in the constitution of this realm as by law established, against the peace of our said Lady the Queen her crown and dignity."

Fifth. "And the jurors, &c. upon their oath, &c. that the defendants, together with divers other evil-disposed persons, to the jurors aforesaid as yet unknown, afterwards, to wit, on the 1st day of August in the year aforesaid, and on divers other days between that day and the 1st October in the year aforesaid, unlawfully did endeavour to excite her Majesty's liege subjects to disaffection and hatred of her laws, and unlawfully did endeavour to persuade and encourage the said liege subjects to unite, confederate and agree to leave their several and respective employments, and to produce a cessation of labour throughout a large portion of this realm, with intent and in order by so doing to bring about and produce a change in the laws and constitution of this realm, against the peace of our said Lady the Queen, her crown and dignity."

Upon being brought up to receive the judgment of the Court, in Easter Term (May 4), a motion in arrest of judgment was made on behalf of the several defendants, who had been convicted upon the above counts, by *Dundas, Murphy* Serjt., *Bodkin* and *Atherton*, on the grounds, as to count 4, that the averments in the early part of that count, which were essential to complete the statement of the offence, were laid without a venue; and that the fifth count had no venue at all. (Other objections were taken to these two counts, which are not reported, as the judgment of the Court did not proceed upon them.)

In Trinity Term, 1843 (*a*), cause was shewn against this rule by

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Sir *F. Pollock* A. G., Sir *W. W. Follett* S. G., *Wortley*, Sir *G. Lewin*, *Waddington*, *R. C. Hildyard* and *W. F. Pollock*. 1. As to the fourth count. The facts that divers evil-disposed persons assembled together in a tumultuous manner, and forced other persons to leave their employments, and impeded the labour carried on by subjects of this realm in certain trades and manufactures, are stated by way of inducement. Perhaps it would not have been necessary that such an inducement should be laid with a venue at common law. But, if this were otherwise, the defect is clearly cured by 7 *Geo. 4*, c. 64, s. 20, which provides that no judgment for felony or misdemeanor shall be stayed or reversed "for want of a proper or perfect venue." The trial may be had where the substance of the offence took place, and the substance of the offence here is, that the defendants unlawfully aided and abetted the said evil-disposed persons. If the acts stated in the indictment had happened out of the county—which will not be assumed—non constat but that the aiding and abetting them in this county might be an offence, provided it was done with the intent laid in this indictment. The defendants in England might aid and abet parties in endeavouring to procure cessation of labour here by acts done in Ireland or France, and this would be an indictable offence. Thus, where a misdemeanor is made up of acts committed in several counties, the venue may be laid in any; and for this purpose, as laid down by *Holroyd J.* in *Rex v. Burdett* (*b*), "the jury may take cognizance of those facts done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases where so much of the misdemeanor charged

(*a*) May 26 and June 3, coram *Williams* and *Coleridge* Js.  
 Lord *Denman* C. J., *Patteson*, (*b*) 4 B. & Ald. 95, 138.

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as is proved to have been done within their county is of itself a misdemeanor;" and the distinction in this respect between felony and misdemeanor is observed upon in the same judgment (p. 171), and in 1 *Stark. Cr. Pl.* 26 (2d ed). The statute 7 *Geo. 4, c. 64, s. 20*, applies wherever the Court "appears by the indictment to have jurisdiction over the offence," and here, if a complete offence was proved to have been committed within the county of Lancaster, namely, the *aiding and abetting* persons, who had been committing a misdemeanor, to persist in it, the substantive part of the charge does appear to have been within the jurisdiction of the Court which tried the indictment; 2 *Inst.* 182, *Jacob's Law Dict.* title "Abet," *M' Daniel's case* (a); and therefore if the statement of the venue be imperfect it is cured. That "aiding and abetting" is the substantive offence appears from the analogy of the cases where the solicitation to commit a crime has been held in itself a complete offence, although the crime was not in fact committed: *Rex v. Fuller* (b), *Rex v. Higgins* (c).

2. The fifth count is undoubtedly defective at common law, there being no venue except in the margin, which is unconnected by words of reference with the body of the indictment. But the statement of the county in the margin is an "improper or imperfect venue," and is therefore cured by 7 *Geo. 4, c. 64, s. 20*, provided the Court sufficiently appear to have had jurisdiction. The venue is an "imperfect" statement that the offence took place in the county of Lancaster. And the case therefore falls under the rule adopted in civil actions, in construction of the enactment of 17 *Car. 2, c. 8, s. 1*, that judgment shall not be stayed or reversed after verdict, "for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid:" *Skinner v. Gunton* (d),

(a) *Foster's Cr. Law*, 121.

(c) 2 *East*, 5.

(b) 1 *B. & P.* 180; 1 *Stark.*

(d) 1 *Saund.* 228.

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*Tyson v. Paske* (a), *Mellor v. Barber* (b), where *Grose J.* referred to the observation of the Court in *House v. Hazelwood* (c), "Had no venue been laid in the body of the declaration, reference must be had to the margin, but where a proper venue is laid in the body of the declaration, the word in the margin shall not vitiate it; the county in the margin will help, but not hurt." So in *Duncan v. Passenger* (d), the words "then and there" in the body of the declaration were held to refer to the county named in the margin. If the county in the margin can then be referred to, that is a sufficient statement of venue, no other venue being necessary since 6 *Geo.* 4, c. 50, s. 13, by which the jury for the trial of "any issue whatever, whether criminal or civil," is to be returned from the body of the county. Even in criminal cases, the marginal venue, if correct, might aid the statement in the count, independently of the statute: *Anonymous case in Keilway* (e), *Leach's case* (f), *Rex v. Butler* (g). [*Coleridge J.* Here there is no statement of venue in the body of the indictment at all. It could only appear that the Court had jurisdiction over the offence, and therefore the statute can only have effect on the assumption that the jury would not inquire into any facts, except such as arose within the locality stated in the margin.] When jurors of a certain county have found that an offence has been committed, it is to be inferred, after verdict, that it was committed within that county. [*Patteson J.* Then I do not understand in what case the jurisdiction of the Court to try the offence would not appear.] It may be argued, on the contrary, that there are no cases, except such as the present, to which the remedial provision of the statute could apply. [*Coleridge J.* Suppose the count contained some irregular statement, from which it might be inferred that the acts were done in the county notified in the mar-

(a) 2 Lord Raym. 1212.

(b) 3 T. R. 387.

(c) Barnes, 483.

(d) 8 Bing. 355.

(e) 33 b, pl. 6.

(f) Cro. Jac. 167.

(g) 2 Keb. 303.

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gin.] The authorities cited in moving do not apply. In *Rex v. Minter Hart (a)*, the point was taken before verdict.

*Erle, Dundas, Baines, Murphy Serjt., Bodkin and Ather-ton* contrà, for different defendants. 1. As to the fourth count. If this had been an indictment for felony, the acts charged against the defendants are such as would have rendered them liable as accessories only. By analogy, therefore, if the offence charged against the principals is not properly laid, the indictment cannot be supported. That offence is the riotous assembling and impeding of labour. But that is not laid as having been done at any specified place. It is therefore not properly laid as an offence; for to aid and abet parties out of England in riotously assembling for the purpose of impeding labour here, cannot be an offence, unless made so by some statute. There may no doubt be cases where the act charged, though ancillary, as it were, to some act done or to be done by other parties, is nevertheless a complete and substantive offence; such as the soliciting to complete a crime; as in *Rex v. Fuller (b)*, where the soliciting was a statutable offence. This argument, therefore, can only be supported by regarding the aiding and abetting, &c. as the substantive offence, and the statement respecting the riotous assemblies as mere inducement; but that is not the case here. The offence of "aiding and abetting" is of necessity dependent on the principal offence, which distinguishes this from the cases of solicitation, and from misdemeanors, such as that of endeavouring to keep away a witness: *Rex v. Lady Lavly (c)*. The offence here may have been committed without any personal communication with the principal offenders: *M' Daniels' case (d)*. [*Patteson J.* "Support and encourage" seem to imply some personal assistance to the principal offenders in what they were doing.]

Next, the riotous assembling, &c. are at all events mate-

(a) 6 C. & P. 123.

(b) 1 B. & P. 180.

(c) Fitzgib. 122, 263.

(d) Foster's Cr. Law, 121.

rial facts; and in every indictment the "time and place ought to be repeated to every material fact:" *Com. Dig. Indictment*, (G. 2), and the cases there cited: *The Lady Russel's case* (a), *Rex v. Haynes* (b), *Boche's case* (c), *Mellor v. Walker* (d), and the reason appears in 2 *Hawk. P. C.* book 2, c. 25.

Nor does the analogy of civil cases hold, the statutes of jeofails being confined to civil matters. The marginal venue refers simply to the presentment of the jurors: 2 *Hale's P. C.* 165; and the mention of place in the body of the indictment will not refer to it in criminal cases, though it may help the want of averments in a declaration: *Hammond's case* (e), *Rex v. Yarrington* (f), *Collins v. Goldsmith* (g), *Rex v. Connop* (h), *Shelley v. Wright* (i). *Rex v. Butler* (k), cited on the other side, shews that the marginal venue cannot be incorporated with the body of the indictment without words of reference. See also *Reg. v. Rhodes* (l), *Anonymous case* (m), *Rex v. Burrige* (n), *Rex v. Kilderby* (o); and *Rex v. Minter Hart* (p) is to the same effect, for the objection, not having been raised by demurrer, must be taken to have had the same effect as if after verdict. The statute 7 *Geo. 4*, c. 64, s. 20, being framed to meet the case of an "imperfect" or "improper" statement of venue, cannot apply where the defect is the absence of any statement as to the substantive offence, or even as to a material fact.

5. As to the fifth count, the same observations apply with additional force, there being no statement of venue whatever, either to the substantive offence or the "aiding

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| (a) <i>Cro. Jac.</i> 17.                        | (i) 2 <i>Com. Rep.</i> 562.           |
| (b) 4 <i>Mau. &amp; S.</i> 214; 1 <i>Stark.</i> | (k) 2 <i>Keb.</i> 303.                |
| <i>Crim. Pl.</i> , 2d ed., p. 62.               | (l) 2 <i>Lord Raym.</i> 886.          |
| (c) <i>Cro. Eliz.</i> 200.                      | (m) 2 <i>Lord Raym.</i> 1304.         |
| (d) 2 <i>Wms. Saund.</i> 59, note 3.            | (n) 3 <i>P. Wms.</i> 496.             |
| (e) <i>Cro. Eliz.</i> 751.                      | (o) 1 <i>Wms. Saund.</i> 308, note 1, |
| (f) 2 <i>Keb.</i> 302.                          | and the cases there cited.            |
| (g) 1 <i>Bulst.</i> 205, n.                     | (p) 6 <i>C. &amp; P.</i> 123.         |
| (h) 4 <i>A. &amp; El.</i> 942.                  |                                       |

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and abetting," unless that in the margin can be imported without any words of reference(a).

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—We are now to dispose of the objections arising from the want of a venue. None is stated in the fifth count, and at common law it is plainly a bad count for that reason. Every material fact must be stated with time and place, in order that the grand jury may appear to have jurisdiction to find the bill, and also that the petty jury may be drawn from the proper county to try the case. This is laid down in all the books and authorities cited at the bar, and indeed the count was scarcely defended at the bar as good at common law, neither containing any venue within itself, nor referring to the county written in the margin.

Recourse must then be had to stat. 7 *Geo.* 4, c. 64, s. 20, enacting that no judgment after verdict or confession or default shall be stayed "for want of a proper or perfect venue, provided it shall appear by the indictment that the Court had jurisdiction over the offence."

Now whether the total omission of a venue can be considered as cured by those words, or whether they are to be confined to cases where some venue is stated, though imperfectly or improperly, in either case the condition on which the remedy is given by stat. 7 *Geo.* 4 is, that the Court shall appear by the indictment to have had jurisdiction over the offence.

If this means local jurisdiction, the fifth count does not shew it, for no place is mentioned in the body of it, and we cannot, as already stated, import into it for this purpose the county noted in the margin, as has been done in civil actions. To hold this, would be to say, as was said by the Solicitor-General, that, whenever a grand jury of any

(a) They also cited *Rex v. Stott*, Justice, 383 (ed. D'Oy. & Wms.), as reported in 2 East, P. C. 753, as to which, see the observations of the Court in the judgment. 780, and *Rex v. Fraser*, 3 Burn's

county has found a bill of indictment for a crime cognizable under the commission, a trial which takes place upon it in that county must be good after verdict, though the indictment may not shew the Court to have any local jurisdiction over the offence, on which condition only the defect is cured by the statute.

The argument drawn from stat. 16 & 17 *Car.* 2, c. 8, and stat. 4 *Anne*, c. 16, was that, as in civil actions the total omission of a venue is cured by the former, under the words "for want of a *right* venue," so the total omission of venue in criminal cases may be cured by 7 *Geo.* 4, under the words "for want of a proper or perfect venue."

But the defect cured in civil actions is not the total omission of venue, but a wrong venue, and it is cured by the statute *Car.*, if "the cause was tried by a jury of the proper county, where the action is laid." Now the action in every civil case is laid in the county stated in the margin, and if the trial take place in that county the condition is fulfilled. By 4 *Anne*, c. 16, the remedy is extended to cases of judgment by default; all the defects which would have been cured by any of the statutes of jeofails, in case a verdict of twelve men had been given in such action, being expressly cured by the 2d section of that statute. To bear any analogy to these statutes, the 7 *Geo.* 4 should have cured defects of venue where the cause was tried by a jury of the county in which the indictment is preferred.

The venue in the margin may shew this, but certainly does not make the indictment shew that the Court had jurisdiction to try the offence, unless it be specially referred to in the body of the indictment.

The distinction between civil and criminal cases in this respect has been established in so many cases, that it is impossible for this Court to overlook or neglect it: *Reg. v. Rhodes* (a), *Lenthal's case* (b), *Rex v. Burridge* (c) and *Rex v. Fossett* (d) there cited. Other cases were referred to in

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(a) 2 Lord Raym. 886.

(b) *Cru. Eliz.* 137.

(c) 3 P. Wms. 439, 496.

(d) 3 P. Wms. 497.



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the argument. It follows then, as the Court cannot connect the body of the indictment with the margin in this case, for want of such special reference, that it does not appear by the indictment that the Court, where the indictment was found, had jurisdiction, and that the defect is not cured by the statute 7 *Geo. 4*, c. 64, s. 20.

The Court has considered whether the words of that statute may not admit of a different and a wider meaning, viz. that the offence shall appear to be of such a nature that the Court has authority to try it, and a strong argument in favour of this construction arose from the apparent impossibility of giving effect to the words in any other manner. But we are satisfied that such is not the case, and are convinced that defects of venue are not intended to be cured, unless the jurisdiction of the Court, in respect of locality, is made to appear.

One consideration is decisive on this point. Persons accused might be punished for offences committed in another realm, if the quality of the offence alone gave jurisdiction. This clearly was never intended.

Mr. *Dundas* referred to a case reported not quite correctly in the last edition of *Burn's Justice* (a). (It is also reported in 1 *Moody's Crown Cases* (b).) I now hold the very case on which the opinion of all the judges was taken, and a copy of the indictment itself. The prisoner was tried for bigamy at the Old Bailey in 1838. The first marriage was alleged to have been contracted in Kent, the second in Surrey. He was alleged to have been apprehended on a day named, but of the place or county in which he was apprehended no mention was made. The conviction was held bad, the felony being proved in Surrey, while the venue in the margin was Middlesex. But no suggestion was offered that Middlesex could be drawn from the margin into the body of the averment of his apprehension, though that would have unquestionably cured the defect.

(a) *Rex v. Fraser*, 3 *Burn's* (b) P. 407.  
 Just. 483 (ed. D'Oy. & Wms.).

Nor did it occur to any one that the conviction could be upheld by the offence of bigamy being such a one as falls within the jurisdiction of the Court.

The objection on the score of omitting a local venue is not merely technical, but is real and important. For the allegation of material facts as occurring in the county, is not only that which alone authorizes the grand jury to entertain the bill of indictment, and generally empowers the Court to proceed against the offenders, but is also the the sheriff's warrant to summon the petty jury, who must pass between the crown and the prisoner. In case of an indictment against witnesses for perjury, their trial might be greatly embarrassed, and perhaps justice defeated, where the jury should appear to have been empannelled to try without authority. To make the act of trying confer the right, without some express provision against those consequences, would be a change so violent that we cannot believe it to have been intended by the legislature.

We are, therefore, of opinion that judgment on the fifth count must be arrested.

An objection was also taken to the fourth count on the score of venue, a material fact being alleged without place.

*Stott's* case, reported in 2 *East's* Pleas of the Crown (a), was thought to bear directly on this doctrine, and was not successfully distinguished in the argument. But the master of the Crown Office has found the paper book in that case, on which Mr. *J. Ashurst* took his note of the argument conducted by Lord *Abinger* on the one side and the late Mr. Justice *Vaughan* on the other, in Michaelmas Term, 1798. The indorsement of that learned judge intimates that the case stood for further argument. The prisoner was convicted in April, and then sentenced to twelve months' imprisonment, more than half of which had expired before the argument, and there is every reason to suppose that Sir *E. H. East* is mistaken in reporting that case as decided. Indeed he himself intimates (b) that, if

(a) 2 *East's* P. C. 751, 753, 780.

(b) P. 753.

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there was error in the sentence, it might possibly have been amended by being changed into transportation for fourteen years, and that the prisoner's counsel was aware of the danger that might attend the success of his argument.

We think, however, that here the statute 7 *Geo.* 4 applies a remedy, as the conduct imputed as criminal to defendants is stated with a venue.

The count avers unlawful assemblies at divers places not named, as introductory of the charge against defendants, which is the aiding and assisting persons to continue the said assemblies, and that aiding and assisting is laid in Lancashire. The Court, therefore, has a venue, though an imperfect one, because the introductory averment of a material fact is without place, but the charge against the prisoners has a venue and refers to the former part of the count, which former part may, therefore, be fairly said to have an imperfect venue, and as the offence is laid with a proper venue the Court appears by this count to have jurisdiction over it.

We are hence of opinion that this count may be supported by force of stat. 7 *Geo.* 4, notwithstanding the objections to its venue.

Judgment arrested on the fifth count.

In the same term (June 9) counsel for the defendants were further heard in support of their rule, in reply to the argument for the crown on shewing cause as to the other objections to the fourth count, but no judgment has been given.

*Tuesday,*  
*April 30.*

ROBERTSON and another *v.* STRUTH.

In a declaration in debt on the judgment of a foreign Court, it is not necessary to state that the Court had jurisdiction over the parties or the cause.

**DEBT.** The declaration stated that judgment had been obtained by the plaintiffs at the Supreme Court of Judicature of the island of St. Vincent's, on the 18th April, 1843, against the defendant for 812*l.* 10*s.* 3*d.* sterling, for their damages

sustained by occasion of the non-performance of certain promises and undertakings of the plaintiffs, and by the said courts there to the plaintiffs adjudged, whereof the defendant was convicted, as by the record and proceeding thereof remaining in the said Supreme Court of Judicature in the island of St. Vincent fully appears; and which said judgment still remains in that behalf in full force, &c., and not in anywise satisfied, reversed, &c.; and plaintiffs have not obtained any satisfaction, &c., by means of which said several premises defendant then became liable to pay plaintiffs the said sum, &c., so adjudged to them, &c., whereby and by reason of the non-payment thereof an action hath accrued, &c.

General demurrer and joinder.


*Martin* for the defendant contended that the declaration was bad, because it did not shew that the Court had any jurisdiction over the defendant; that it contained no averment of his having been at any time in the island, or that the cause of action accrued there. He cited *Collett v. Lord Keith* (a), *Ferguson v. Mahon* (b).

*Bovill* contra, contended that the declaration followed the usual and approved form, and cited 2 *Chitty* on Pleading, 7th ed. p. 305, *Cowan v. Braidwood* (c), *O'Callaghan v. Marchioness Thomond* (d), *Peacock v. Bell* (e), *Pigge v. Gardner* (f).

*Martin* in reply. [*Wightman*, J. The judgment of the Court of Jamaica in an action for a debt has been held to be *prima facie* evidence of the debt, "though it is competent to the defendant to impeach the justice of the judgment, by shewing it to have been irregularly or unduly

(a) 2 East. 260.  
 (b) 11 A. & E. 179; S. C. 3  
 P. & D. 143.  
 (c) 1 M. & Gr. 882.

(d) 3 Taunt. 82.  
 (e) 1 Saund. 73.  
 (f) 1 Lev. 208.

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obtained :” Lord *Mansfield* in *Walker v. Walker* (a), referring to *Sinclair v. Fraser* (b), cited in *The Duchess of Kingston’s case* (c).]

PER CURIAM (d).

Judgment for defendant.

(a) 1 Doug. 1.

(d) Lord Denman C. J., *Patterson*,

(b) 1 Doug. 4, 6.

*Williams* and *Wightman* Js.

(c) 20 Howell’s St. Tr. 468.

LUCAS and others, executors of ROSE, v. JONES.

**COVENANT.** The declaration set out the title of *Thomas Weatherby Marriott* to certain premises in fee, and that *Marriott*, to wit, on the 1st June, 1831, demised by indenture to defendant, his executors, &c., the said premises for twenty-one years, from 25th March then last, at the rent of 57*l.* 16*s.* payable quarterly, that defendant covenanted to pay such rent, and entered on the premises. The declaration then stated that afterwards, to wit, on the 23rd May, 1832, *Marriott* appointed the premises to *J. H Mair*, and *Rose* the testator, in fee. It then set out the death of *Mair* on 5th April, 1836, leaving *Rose* surviving, who continued seised of the premises to his death. That during the life of *Rose*, a large sum, &c., to wit, 80*l.*, &c., rent for five quarters became due by defendant to *Rose*.

Monday,  
 May 6th.

The following instrument was tendered by defendant in support of a plea of payment of rent to M.: “Mr. Jones (defendant) having written off the sum of 75*l.* from his mortgage debt, being five quarter’s rent of his house, I hereby discharge the same rent till the 24th day of July, 1841.”

The instrument was signed by M.: the mortgage debt in question was due from M. to defendant; and the paper had been delivered by M.

to defendant as a settlement of account. It was stamped with a 1*l.* stamp, with no denomination, and, appearing to have been affixed more than one month after the signing and delivery of the paper: *Held*, inadmissible, as being a receipt within 55 Geo. 3, c. 184, and consequently not stamped in time.

Plea, payment by defendant to, and acceptance by *Marriott*, of a large sum, to wit, &c., in satisfaction and discharge of the sum claimed, with an averment that at the time of the payment, defendant had no notice or knowledge of the transfer of the reversion by *Marriott* to *Mair* and the testator *Rose*, or of any title, interest or authority, of *Mair* and *Rose*, of, in, or to the said reversion, or of, in, or

to the moneys so paid by defendant to *Marriott*, or any part thereof, and so defendant in fact saith, that no part of the said 80*l.* in the declaration mentioned ever became or was due or owing by defendant to *Rose* in manner and form, &c. Verification.

Replication, that defendant did not pay to *Marriott*, nor did *Marriott* accept or receive the monies in the plea mentioned in satisfaction and discharge, &c., in manner and form, &c., issue tendered and joined.

There were other issues of fact.

The cause was tried at the Middlesex Sittings in Michaelmas Term, 1843, before *Patteson J.* The following facts were proved by the defendant in support of his plea. That in July, 1841, *Marriott* was indebted to the defendant in a sum greater than the amount of five quarters' rent due from defendant, which was secured by a mortgage on premises of *Marriott*. That in pursuance of an agreement, between *Marriott* and the defendant, that the arrears of rent should be set off against the mortgage debt, the following paper was signed by *Marriott*, and handed to the defendant.

" Mr. *Jones* having written off the sum of 72*l.* 3*s.* 9*d.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent to the 24th July, 1841."

This paper was tendered in evidence for the defendant. It was stamped with a 1*l.* stamp, without any denomination, and with an indorsement by the commissioners of stamps to the effect that it had been affixed, on payment of a penalty, more than a month after the date of the instrument. Counsel for the plaintiffs contended that the document was inadmissible, inasmuch as in order to prove the plea it must be treated as a receipt. That it came also within the definition of a receipt in the Stamp Act, 55 *Geo.* 3, c. 184, " any note, memorandum, or writing whatever, given to any person for or upon the payment of money, whereby any sum of money, debt, or demand, or any part of any

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debt or demand therein specified, and amounting to 2*l.* or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, &c." That, although the stamp of 1*l.* is greater than that required for a receipt for money of this amount, yet the provision of 55 *Geo.* 3, c. 184, s. 10, that instruments stamped with stamps of improper denomination, but equal or greater value with or than the regular stamps, shall be deemed valid, does not apply, because by 35 *Geo.* 3, c. 55, ss. 8, 10, 11, receipts must be stamped within a month after execution. The learned judge received the document in evidence; verdict for the defendant on that issue.

*Jervis* for the plaintiffs in the following term obtained a rule nisi for a new trial, on the ground of the reception of this document, against which

*Platt* and *Barstow* now shewed cause.

*Jervis* contra.

LORD DENMAN C. J.—It was the purport of the agreement, between *Marriott* and the defendant, that the writing off the mortgage debt was to be considered as money. The instrument therefore was a receipt or discharge given on the payment of money, and not stamped in time.

PATTESON J.—There is no doubt that instruments which purport merely to admit a settlement at a former time, may operate as admissions only, and not receipts. But this instrument evidences a payment made at the time. And the provision in 55 *Geo.* 3, c. 184, s. 10, which might have applied if the instrument had been stamped before execution, or within a month after it, on payment of a penalty, will not remedy the defect where the stamp is affixed more than a month after execution.

WILLIAMS and WIGHTMAN Js. concurred.

Rule absolute.

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Monday,
April 29.

The QUEEN v. RICHARDS, BIRD and others.

A HABEAS Corpus issued in this term, commanding the keeper of the house of correction at Leicester to bring up the bodies of *Joseph Richards, John Bird, James Walker* and *William Bird*, committed and detained in the said prison, with the days and causes of their being detained, &c.

The keeper returned as follows:—"Leicestershire to wit. I, *John Allen*, the keeper, &c., do certify and return, &c., that, before the coming to me of the said writ, that is to say, on the 8th day of April, A.D. 1844, *J. Walker* and *W. Bird*, in the same writ also named, were severally committed to my custody by virtue of a certain warrant of commitment, the tenor of which is as follows,"—"Leicestershire to wit. To the constable of Worthington in the said county, and to the keeper of the house of correction at Leicester, in the said county. Whereas information and complaint hath been made before me *William Wootten Abney*, Esq., one of her Majesty's justices of the peace in and for the said county, by *Benjamin Walker*, of Worthington, in the said county, coal master, upon the oath of the said *B. Walker*, against *J. Walker* and *W. Bird*, late of Worthington aforesaid, in the said county, colliers to the said *B. Walker* at his Smorle colliery, that they the said *J. Walker* and *W. Bird* have, in their said service, severally been guilty of a certain misconduct, misdemeanor, miscarriage and ill behaviour towards him the said *B. Walker*, in that they the said *J. Walker* and *W. Bird*, having severally entered into their service, have severally therein not fulfilled their contract, by having, at the township of Worthington in the said county, on the 4th day of April instant, severally neglected their work in such service contrary to the statute (a). And whereas in pursuance of the statute,

(a) 4 Geo. 4, c. 34, s. 3.

the same offence. Held, that the second warrant of commitment being valid the prisoner was not entitled to his discharge.

The return to a writ of habeas corpus stated that, on the 8th of April, 1844, the prisoner was committed by a warrant of commitment under the hand and seal of *H. B.*, a justice, &c., dated the said 8th day of April. The return then set out the commitment, reciting a conviction for an offence against stat. 3 Geo. 4, c. 34, s. 3, which was bad on the face of it, and then went on to allege that afterwards and whilst the prisoner was so in custody the same justice caused to be delivered to the gaoler another warrant of commitment, setting it out at length, by which it appeared that the prisoner was committed by the same justice on the same day and for

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I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined that they the said *J. Walker* and *W. Bird* have in their said service severally been guilty of a certain misconduct, misdemeanor, towards the said *B. Walker*, in that they the said *J. Walker* and *W. Bird*, having severally entered into their said service, have severally therein not fulfilled their said contract, by having, at the township, on, severally neglected their work in such service, contrary to the statute (a). And I do therefore convict them the said *J. Walker* and *W. Bird* of the said offence, in pursuance of the statute (a) in that case. These are, therefore, to command you the said constable forthwith to convey the said *J. Walker* and *W. Bird* to the said house of correction at Leicester aforesaid, and to deliver them to the keeper thereof together with this warrant. And I do hereby command you the said keeper to receive the said *J. Walker* and *W. Bird* into your custody in the said house of correction, there severally to remain and severally to be kept to hard labour for the space of three months from the date hereof, and for your so doing this shall be your sufficient warrant. Given under my hand and seal the 8th day of April, A. D. 1844. *William Wootten Abney.*" (L.S.) "And I do further certify," &c. The return then certified that on the same 8th of April, 1844, *J. Richards* and *J. Bird*, in the same writ named, were severally committed to the keeper's custody, by virtue of a certain warrant of commitment set forth in the return, and exactly like the preceding, except in the names of the parties committed. It then proceeded as follows :—

"And that afterwards and whilst the said *J. Walker*, *W. Bird*, *J. Richards* and *J. Bird* were respectively so in my custody, that is to say, on the 15th day of April, A. D. 1844, the said *W. W. Abney* caused to be delivered to me a certain other warrant of commitment, the tenor of which is

(a) 4 Geo. 4, c. 34, s. 3.

as follows,—“Leicestershire to wit. To all and every the constable and other officers of the peace for the said county whom these may concern, and to the keeper of the house of correction at Leicester in the said county. These are in her Majesty's name to command you and every of you the said officers forthwith to convey and deliver into the custody of the said keeper the body of *J. Walker*, late of Worthington in the said county, collier, being convicted before me *W. W. Abney*, Esq., one of her Majesty's justices of the peace in and for the said county, upon the evidence on oath of *B. Walker*, of Coleorton in the said county, for that he the said *J. Walker* did contract with the said *B. Walker* to serve him in the capacity of a collier for an indefinite period, determinable nevertheless on either of the said contracting parties giving to the other fourteen days' previous notice of his intention to determine the said contract, and that the said *J. Walker* did enter into the services of the said *B. Walker*, and did continue to serve him the said *B. Walker*, and to be employed by him as a collier, under and according to the said contract, at the township of Worthington in the said county of Leicester, so being then and there in the service of him the said *B. Walker* as a collier, until the 4th day of April instant, and, the term of the said contract being then subsisting and incomplete, he the said *J. Walker* did misconduct and misdemean himself in his said service, to wit, did neglect his work and refuse to go to it on being requested by the said *B. Walker* so to do, whereby divers other persons employed in the same pit were prevented from proceeding with their ordinary employment, and the said *B. Walker* sustained great damage and loss, contrary to the form of the statute in such case, for which said offence I, the said justice, have ordained and adjudged the said *J. Walker* to be imprisoned in the house of correction at Leicester in and for the said county, and there kept to hard labour for the space of three months, and you the said keeper are hereby required to receive the same *J. Walker*

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into your prison, and him there safely to keep for the aforesaid term of three months, and during that time to be kept to hard labour, and for your so doing this shall be to you and every of you a sufficient warrant. Given under my hand and seal at Swepstone, in the said county of Leicester, this 8th day of April, A.D. 1844. *William Wootten Abney.*" (L.S.) "And also a certain other warrant of commitment, &c." The return then set out three other warrants precisely similar, except in the names of the parties committed, against *W. Bird, J. Richards* and *J. Bird*, "and that the said *J. Walker*, in the first warrant mentioned, is the same *J. Walker* as in the third warrant mentioned." (The return then identified the other three parties respectively with those mentioned in the former warrants.) "And these are the causes of detaining the said *J. Walker*, whose bodies I have here ready as by the said writ I am commanded."

"The answer of *J. Allen*, keeper of the house of correction."

Bodkin, Fry and *Huddleston* for the prisoners. The return states a detainer by virtue of two warrants, each stating a conviction of two of the prisoners; it also returns four separate warrants of commitment, each applicable to a single prisoner. These four severally contain the recital of a conviction, but are not convictions themselves. The two former warrants must be treated as the convictions, and that the intention of the justice is to substitute warrants of commitment free from objection for those which are informal. In that case, he ought to have withdrawn the former warrants. In *Re Elmy and Sawyer*, (a) there the party had been convicted in a penalty under statute 3 & 4 Will. 4, c. 53, and committed till he should pay the forfeiture. The 90th section of that act empowered the justices to amend the conviction or warrant of commitment, whether before or after conviction. The former warrant, which was in-

(a) 1 Ad. & Ell. 843.

formal, had been withdrawn from the gaoler and another substituted, but it did not appear by whom. The Court there would not presume from the facts returned on the warrant that the second warrant was substituted by the justices as an amendment of the first, in pursuance of the authority given by the act, and discharged the prisoners. There, there was a power to amend an erroneous conviction given by statute, but here there is no such power. The erroneous convictions, therefore, are not amendable by the justice : *Rogers v. Jones (a)*. But it is clear that they are not sustainable as convictions. [This was admitted by *Whitehurst*.] Then the detainer can only be supported by the four subsequent warrants. But as the gaoler is to return the cause of taking, and the detainer, it appears that the commitment in each case was grounded on a bad conviction. If the instruments are to be considered as operating both as warrants of commitment and convictions, they are bad because they allege no time or place when or where the refusal to work took place. It might have been out of the jurisdiction of the justice. Neither is it shewn that the contract was within the act 4 Geo. 4, c. 34 : *Lancaster v. Greaves (b)*. These are both material allegations, if the instruments are to be taken as warrants, not grounded upon prior convictions. But, if such convictions are necessary, then the two convictions returned must be taken to be the convictions on which the warrants are grounded. The parties were at all events illegally in custody till the receipt of the subsequent instruments.

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Whitehurst contra. The last warrant sets out offences within the third section of the act 4 Geo. 4, c. 34. Each of them states that the prisoner did contract with the said *B. Walker* to serve him in the capacity of a collier in the township of Worthington, in the county of Leicester. It is, therefore, clear the contract is within the act, and at a place within the jurisdiction of the justice. The words in

(a) 5 D. & R. 268.

(b) 9 B. & C. 698.

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and for the county in the recital of the conviction mark that the justice acts in the county, and the venue shews the residence of the justice at the time. This is the form of all orders of removal to which the same doctrine applies. The gaoler, therefore, returns a good warrant of commitment, namely, that delivered on the 15th of April. Can the Court then discharge the prisoner because another cause has been returned with regard to him, which is insufficient? The case of *Re Elmy and Sawyer* (a) was decided, not on the general power, but on the special act, and the authority there given. The second warrant contained no reference to the first, and the gaoler stated that the first had been taken from his house. It did not, therefore, appear that the justices did intend to amend the former warrant. But this case differs. The Court cannot discharge the prisoner unless wrongfully in custody. But he is not wrongfully so, if under a legal warrant. The gaoler may be liable for the intermediate time, but that will not entitle the prisoner to his discharge. The Court will not assume that the subsequent warrants were founded on the prior ones, and that the conviction is bad, when there is a warrant of commitment reciting a good conviction.

Lord DENMAN C. J.—We think you right in that respect. We cannot say the commitment is bad when the warrant shews a legal conviction upon which it is supported.

PATTESON, WILLIAMS and COLERIDGE Js. concurred. (b)

(a) 1 Ad. & Ell. 843.

(b) See *Reg. v. Tordoff*, ante, p. 693.

THE following rule was read in this Court on April 24th in the present term.

REGULA GENERALIS.

Easter Term in the Seventh Year of the Reign of Queen Victoria.

IT is ordered that for the future it shall not be necessary to have a warrant of attorney to acknowledge satisfaction of a judgment, or a judge's fiat thereon, but that it shall be requisite only to produce a satisfaction piece similar to that in use in the Court of Queen's Bench ; except that in all such cases such satisfaction piece shall be signed by the plaintiff or plaintiffs, or their personal representatives, and such signature or signatures shall be witnessed by a practising attorney of one of the Courts at Westminster, expressly named by him or them, and attending at his or their request to inform him or them of the nature and effect of such satisfaction piece before the same is signed, and which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, and state he is witness as such attorney, but any judge at chambers shall have power to make an order dispensing with such signature of the plaintiff or plaintiffs, or their personal representatives, under special circumstances, as he may think right : And that, in cases where the satisfaction piece is signed by the personal representative of a deceased plaintiff, he shall prove his representative character in such way as the Master may direct.

(Signed.)	DENMAN.	J. WILLIAMS.
	N. C. TINDAL.	J. T. COLERIDGE.
	FRED. POLLOCK.	T. COLTMAN.
	J. PARKE.	T. ERSKINE.
	E. ALDERSON.	R. M. ROLFE.
	J. PATTESON.	WM. WIGHTMAN.
	J. GURNEY	C. CRESSWELL.



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Where an annuity was granted by the defendant to the plaintiff in 1826, part of the securities for which was a warrant of attorney and judgment, which were afterwards, in 1842, set aside by the Court, upon application by the defendant, the rule nisi stating amongst other grounds a defect in the memorial, but it did not appear from the rule absolute that the judgment and warrant of attorney were set aside upon that ground, and no examined copy of the memorial was produced by the defendant, nor any defect therein proved:—

Held, 1. That an action for money had and received lay by the plaintiff to recover the consideration of the annuity.

2. That the Statute of Limitations was no bar to the action, the defendant not having proved the annuity to be void ab initio. *Huggins v. Coates.* 433

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And for maliciously detaining him after the Court had ordered his discharge, and the defendants had notice thereof, *quære*, if any action lies, but at all events, if any, it would be trespass, and not case. *Magnay v. Burt.* 652

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Where a borough corporation, under a claim that a particular office was vacant, or that it had been abolished by the Municipal Corporation Act, had for some years wrongfully received the fees, amounting to upwards of 600*l.*, payable to the holder of such office, *held* that in-

debitatus assumpsit for money had and received might be brought against the corporation; for, as it would be absurd to suppose that a corporation would contract under seal to refund money which they claimed to be their own, the necessity of the case required such a remedy. *Hall v. Mayor, &c. of Swansea.* 475

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1. An attorney on the shilling roll, under 11 Geo. 4 & 1 Wul. 4, c. 70, s. 16 (entitled to practise in the superior Courts in actions and suits against persons residing in Cheshire or Wales), is within the description of attorneys "practising in England or Wales" in 6 & 7 Vict. c. 73, s. 3, and consequently his articulated clerk is entitled to be admitted and enrolled an attorney under the provisions of the latter act. *In re Davis.* 463

Right of Attornies in Partnership to bind the Firm by Guarantee.

2. One of a firm of attornies has no general authority to bind the firm by a guarantee given to pay debt and costs, in consideration of the plaintiff discharging his debtor out of custody. *Hasleham v. Young.* 700

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Payment.

In an ordinary banking account the first item of the debit side is discharged by the first item on the credit side. But where the plaintiffs were bankers, and one of the defendants upon opening an account with them had borrowed of them 1000*l.*, for which he, together with the other defendants, became bound to the plaintiffs, with a condition for repayment with interest by a certain day, and continued afterwards to pay in and draw out money upon the usual footing of a banker's account; and the first sum entered to his debit

on the account was partly made up of the 1000*l.*, to secure which the bond had been given. *Held*, on a plea of solvit post diem, that the bond was not satisfied by sums subsequently paid in exceeding in amount the 1000*l.*, it not being the intention of the parties that the first item of the debit side should be reduced by the first item of the credit side, but that the bond should stand to secure the plaintiffs against such advances as they should from time to time make to the defendant. *Henniker v. Wigg.*
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BANKING COMPANY.

Return of Accounts to the Commissioners of Stamps.

Under the 7 *Geo.* 4, c. 46, which by s. 5 requires that copies of the annual accounts of banking companies within the act shall be verified by the oath of the public officer, taken before any justice of the peace, and in schedule A. contains a form of such affidavit, ending, "sworn before me, justice of the peace in and for the said county:" *Held*, that a return, which appeared on the face of it to be verified "before J. L.," without adding that he was a justice of the peace, was receivable in evidence, it being shown that J. L. was in fact a justice.

The act requires, by section 5, that such return shall be delivered to the Commissioners of Stamps every year, "between the 28th February and the 25th March:" *Held*, not necessary, in order to make the copy of such return admissible in evidence under section 6, that it should be shewn on the face of such copy or otherwise that the return had been delivered at the Stamp Office within the specified time.

In an issue directed between the partners of a banking company

and certain defendants, to try whether the said defendants, as partners in a certain joint stock company, were indebted to the banking company: *Held*, that it was no defence to shew that some of the defendants were also partners in the banking company, as the issue was directed to ascertain the fact of the defendants being indebted, and was not to be determined, like an *action*, by the legal rights of the parties. *Bosanquet v. Woodford.*
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BANKRUPTCY.

Fraudulent Preference.

1. In order that a payment should constitute a fraudulent preference, it is not necessary that the bankrupt should have intended to benefit the creditor to whom the payment is made, or that the creditor should have derived benefit from such payment.

Therefore where a bankrupt, who together with his wife had joined in mortgaging for 700*l.* a sum of 2000*l.* in the three per cent. Reduced Annuities, settled to the separate use of the wife, with a power of appointing to the husband for life, and to their children in remainder, paid off the creditor:—*Held*, that this was a fraudulent preference, although the object of the payment was to redeem the stock and benefit the bankrupt's own family. *Marshall v. Lamb.*
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*Action by twice certificated Bankrupt who has not paid 15*s.* in the pound.*

2. Under stat. 6 *Geo.* 4, c. 16, ss. 63, 127, and 1 & 2 *Will.* 4, c. 56, s. 25, a person who has been twice bankrupt and obtained his certificates, but has not paid 15*s.* in the pound, may maintain an action in respect of property acquired since his last certificate, unless his assignees interfere. So *held* in the

Exchequer Chamber, reversing the judgment of Q. B. *Herbert v. Sayer* 723

Promise, reviving Debt barred by Certificate.

3. The following note held to be sufficiently signed, and to contain a sufficient promise under stat. 6 Geo. 4, c. 16, s. 131, so as to revive a claim barred by the bankrupt's certificate: "Mr. *Stanley* begs to inform Messrs. *Lobb & Co.* that he will take an early opportunity of settling their account, but Mr. *Stanley* objects to give his bill." *Lobb v. Stanley.* 635

Duty of Official Assignee as to Payment of Money into Bank of England.

4. The Lord Chancellor made an order under 1 & 2 Will. 4, c. 66, directing each official assignee of the Court of Bankruptcy to pay into the Bank of England all such sums of money as should come to his hands as soon as they should amount to 100*l.*, and to state, among other particulars, "the name and description of the bankrupt or bankrupts to whom the money belonged." Held, that, under this order, an official assignee is bound to pay into the bank as soon as the moneys in his hands from several estates amount in the whole to 100*l.*

Practice as to cancelling Bail Bond entered into in Court of Bankruptcy.

5. This Court will not order a bail bond, entered into in the Bankruptcy Court, under stat. 1 & 2 Vict. c. 110, s. 8, to be delivered up to be cancelled, upon affidavit that the defendant has rendered himself according to the condition of the bond. *Hayward v. Heffer.* 454

Proof of Fiat.

6. A fiat in bankruptcy is sufficiently proved by shewing it to have been

signed by a Master in Chancery without also proving his authority from the Chancellor to sign fiats under 1 & 2 Will. 4, c. 56, s. 12. *Marshall v. Lambe.* 315

Rights of assignees against creditor on warrant of attorney. See WARRANT OF ATTORNEY, 2.

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BASTARDY.

See POOR.

BET.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Sum payable absolutely.*

1. "On demand I promise to pay to S. the sum of 50*l.* in consideration of foregoing and forbearing an action at law in the Court of Queen's Bench, for damages ascertained by consent to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway."

Held, that the money was payable absolutely, and the instrument a promissory note. *Shenton v. James* 331

Qualified acceptance.

2. Assumpsit by indorsee against acceptor of a bill of exchange, accepted "payable at C. & Co., bankers, London."

Demurrer on the ground, that as an acceptance payable at a banker's generally, without the restrictive words of stat. 1 & 2 Geo. 4, c. 78, "and not elsewhere," is a general acceptance, and ought to

be so declared upon, therefore the declaration, being upon an acceptance payable at a banker's, must be understood to mean an acceptance payable at a banker's and not elsewhere, and was bad for not averring presentment at the banker's.

Held (on error in the Exchequer Chamber,) that such averment was unnecessary, as the effect of such an acceptance as that declared upon was to make the presentment at the banker's a good presentment, but not to make presentment there necessary, and therefore that the declaration was good. *Halstead v. Skelton*. 664

Consideration as against Indorsee.

3. In an action by indorsee against drawer of a bill of exchange, a plea that defendant indorsed it in blank and delivered it to one C. for a special purpose, viz. to get it discounted, and without value, and that C. got it discounted by the plaintiff and W. jointly, and delivered it to the plaintiff and W. jointly, and that there was no consideration from the plaintiff solely for the indorsement or delivery:—*Held* bad. *Wood v. Connop*. 223

Consideration where Acceptance in Fraud of Partnership.

4. Where, under an issue on the plea of non acceptit, it appears that the acceptance is made in the name of a firm by a partner competent to bind the firm, then, although such acceptance is shewn to be a fraud on the firm, yet, if it is not shewn that the holder had knowledge of the fraud, he is not called upon to prove that he gave consideration. *Musgrave v. Drake*. 347
- See also PLEADING, 6, 7, 11.

BOND.

Assignment of Breaches.

In an action of debt on a money bond,

where breaches have been assigned in the replication, and defendant has then suffered judgment by default, such assignment of breaches is regular, and a writ of inquiry may be executed thereupon, the ordinary course of striking out the pleadings subsequent to the declaration and suggesting breaches being only a practice adopted for the sake of convenience. *Laves v. Shaw*. 714

BOROUGH.

Mayor—Alderman—Election—Quo Warranto.

1. The Court of Queen's Bench will not in its discretion grant a rule for an information in the nature of a quo warranto against the mayor of a borough, where the ground of objection to his title is that he was unduly elected alderman, such election having taken place more than twelve months before the rule was moved for; there being no special circumstances to induce the Court to interfere.

The "notice of his election," within five days of which the mayor elect is required by 6 & 7 Will. 4, c. 76, s. 51, to "accept such office by making and subscribing the declaration," means notice acquired either by being present at the election, or by official notification; where, therefore, it appeared that the party elected had no notice of either of these descriptions, but had received information of his election in a private manner, it was held that he was not bound to subscribe the declaration within five days of being so informed.

Where a quo warranto is applied for against a mayor, the ground specified in the rule nisi being that he was unduly elected *alderman*, this is not such a statement of objection as to be defective under the rule H. T. 7 & 8 Geo. 4, that "the objection intended to be made to

the title of the defendant shall be specified in the rule to shew cause," if it appear from the affidavits that his title as mayor, which is challenged, was founded upon his title as alderman. *Reg. v. Preece.* 156

2. By the 7 *Will.* 4 & 1 *Vict.* c. 78, s. 45, voting papers for the election of aldermen must contain the "place of abode," of the person voted for:—*Held*, that this requisite was not satisfied by papers naming the house where the person voted for carried on the business of a bookseller, sleeping elsewhere.

This defect is not cured by the general provision of 5 & 6 *Will.* 4, c. 76, s. 142, that no inaccurate description in any voting paper "required by this act" shall hinder the full operation "of this act." *Reg. v. Deighton.* 682

Town Council.

Right of, to appoint gaol chaplain.
See GAOL.

Justices.

Right of, to appoint gaol chaplain.
See GAOL.

Clerk to Justices.

His fees. See JUSTICE, 2.

BURGESS.

Not a Corporate Officer—Quo Warranto.

3. A burgess is not a "corporate officer" within sect. 5 of stat. 6 & 7 *Vict.*, and therefore cannot be called upon to shew cause in the first instance against a rule for an information in the nature of a quo warranto. *Reg. v. Milner.* 495

Occupation to qualify a Burgess.

4. The defendant entered by indenture into partnership with *J. D.*, who was owner in fee of a house within a borough, in which it was agreed that the business of book-selling was to be carried on by them jointly in the house, *J. D.* to

require no rent for the parts of the house in which the business was carried on, and the fixtures in those parts to be joint property. The defendant and *J. D.* carried on business in the house, and were jointly rated, the defendant residing elsewhere; *semble*, that the defendant was an "occupier," and entitled to be a burgess within the 5 & 6 *Will.* 4, c. 76, s. 9. *Reg. v. Deighton.* 682

See also 2.

WATCH COMMITTEE.

Borough Fund, Misapplication of.

5. An order by a town council for the payment out of the borough fund of law expenses incurred in prosecuting parties for riot and assault on the mayor in the execution of his duty, is illegal, there not having been any previous resolution of the town council authorising the incurring such expenditure.

A similar order for the payment of a debt secured by the mayor's promissory note, the sum having been borrowed for the purpose of paying debts of the corporation incurred since the passing of the 5 & 6 *Will.* 4, c. 76, is likewise illegal.

Such orders may be removed by certiorari and quashed, although existing only in the form of resolutions of the council entered in the minute book, and signed by the mayor only. *Reg. v. Town Council of Lichfield.* 491

6. The town council has no power under the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), to order the expenses of an indictment against a borough constable to be paid out of the borough fund.

But *semble*, the watch committee might, under sect. 82, make such an order, subject to the approbation of the council. *Reg. v. Thompson.* 497

7. It is a misapplication of the borough fund to pay out of it the costs of shewing cause against a rule for a mandamus to try which of two candidates for the office of town councillor was duly elected, unless some general right or interest of the corporation is affected by the proceedings. *Reg. v. Leeds.* 143
When fees payable out of, to justice's clerk. See JUSTICE, 2.

BREACHES.

Assignment of. See BOND.

BRIDGE.

Upon an indictment charging a township with a prescriptive liability to repair a bridge, the declarations of an inhabitant are admissible against the township, for he is a party to the record, whether rated or not, and cannot be compelled to attend as a witness.

An indictment stated that from time whereof, &c. there hath been and still is an ancient bridge, that one part of it was in township *A.* and the other in parish *B.*; that the part in *A.* was out of repair, and that *A.* was under a prescriptive liability to repair.

It appeared that the bridge consisted of four arches, part of the principal arch and the whole of the other arches being in *A.*, and that in 1806 the principal arch had been widened from 9 to 16 feet at the joint expense of *A.* and *B.*

Held, that there was no misdescription of the township's liability, as, if the prescriptive liability to repair the ancient bridge was well described, it was no answer to show that there was something else, which defendants were not bound to repair.

And *quære*, whether the widening of the bridge was any thing more than a mode of repair, so that the bridge was still the same bridge, and the prescriptive lia-

bility extended over the added part as well as the old. *Reg. v. Adderbury, East.* 324

CAPIAS AD RESPONDENDUM.

No longer a step in the action. See PRACTICE, 1.

CAPIAS AD SATISFA- CIENDUM.

Justification under.

Trespass for assault and false imprisonment. Plea of justification under a writ of *ca. sa.* Replication, that the said writ was after the issuing thereof, and before the commencement of the suit, ordered to be set aside and was set aside by order of a judge:—*Held*, on special demurrer, that the replication was bad for not averring that the writ was set aside for irregularity. *Prentice v. Harrison.* 50

CARRIERS.

Liability of railway company as carriers. See RAILWAY COMPANY, 1.

CASE.

For false Representation without Fraud.

Case by the plaintiffs as sheriffs of Middlesex against the defendants as attornies of one *Power*, for falsely representing to the plaintiffs that one *J. W.*, who was then in their custody as sheriff, and entitled to his discharge, was another *J. W.*, against whom the defendants as attornies for the said *Power* had sued out a writ of *ca. sa.*, and delivered the same to the plaintiffs, by reason whereof the plaintiffs wrongfully detained the first mentioned *J. W.*, and were afterwards obliged to pay 10*l.* and the costs of an action commenced against them by him for the unlawful detainer. The declaration, after stating the delivery of the writ to the plaintiffs, and that the

J. W. then in their custody was not the same person as the *J. W.* mentioned in the writ, and that he was entitled to his discharge, went on to aver that the defendants, well knowing the premises, and for the purpose of preventing the plaintiffs from discharging the said *J. W.*, made the false representation.

Held (on error in the Exchequer Chamber, reversing the judgment of the Court of Queen's Bench), that a plea alleging that defendants had reasonable and probable cause to believe and did believe their representation to be true, was an answer to the action.

Collins v. Evans. 669

Case for the arrest of a privileged person. See **ARREST**.

Against innkeeper for negligently stabling a horse. See **INNKEEPER**.

For instigating an action. See **REASONABLE AND PROBABLE CAUSE**.

CENTRAL CRIMINAL COURT.

Averment of jurisdiction in indictment. See **CRIMINAL LAW**, 4.

CERTIFICATE.

Judge's Certificate for speedy Execution.

A certificate for speedy execution to issue "for the sum recovered by the verdict" includes costs as well as damages.

Where, therefore, a judge had so certified for the plaintiff in an action of assumpsit, and the plaintiff issued a *capias* for the damages only:—*Held*, that he could not obtain a second *capias* for the taxed costs. *Smith v. Dickinson.* 468

Bankruptcy certificate. See **BANKRUPTCY**.

CERTIORARI.

Resolutions of town council removable by certiorari. See **BOROUGH**, 5.

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Judgment at the assizes where case removed by certiorari. See **OATHS**.
Venue in cases removed from the Central Criminal Court. See **CRIMINAL LAW**, 4.

Application for, too late. See **SEWERS**.

"Prosecutor," his liability for costs. See **COSTS**, 3.

CHAIRMAN.

Of railway board, signature to minutes. See **RAILWAY COMPANY**, 2.

CHAPLAIN.

Right of borough justices to appoint. See **GAOL**.

CHARTER.

Validity of grant. See **GRANT**.

CHARTERPARTY.

See **FREIGHT**.

CHURCH RATE.

Refusal to concur in making Church Rate—Prohibition.

A citation against a parishioner, charging him with that he "wilfully and contumaciously obstructed, or at least refused to make or join or concur in the making of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church," does not contain a sufficient allegation of an offence cognisable by an Ecclesiastical Court.

Where the parishioner had appeared under protest to such a citation, and, his protest having been overruled, had been ordered to appear absolutely, a declaration in prohibition held good on demurrer, on the ground that the citation was insufficient to give jurisdiction, and the application not premature. *Francis v. Steward.*

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CLERGYMAN.

Defamation of. See ECCLESIASTICAL LAW.

CLERK.

Justice's clerk, fees of. See JUSTICE, 2.

Parish clerk, dismissal of. See OFFICE.

CO-DEFENDANT.

Suggestion of his death. See CONSPIRACY, 1.

COLLIER.

Pit bond, construction of. See CONTRACT, 2.

COMMITMENT.

1. In a commitment in execution, under stat. 4 Geo. 4, c. 34, s. 3, which is intended by the statute to operate as a conviction, the warrant must show that the magistrate has done all that is necessary to make the conviction lawful. Therefore where it did not sufficiently appear, on the face of the warrant of commitment, that the witnesses in support of the charge had been examined in the prisoner's presence :—*Held*, that he was entitled to his discharge. *Reg. v. Tordoft.* 693
2. To a writ of habeas corpus to the keeper of the house of correction at Leicester, the gaoler returned, that on the 8th of April, 1844, the prisoner was committed to his custody by a warrant of commitment under the hand and seal of H. B., a justice of the peace for the county, dated the said 8th day of April. The return then set out the commitment, reciting a conviction for an offence against stat. 3 Geo. 4, c. 34, s. 3, which was bad on the face of it, and then went on to allege that afterwards and whilst the prisoner was so in custody, the

same justice caused to be delivered to him another warrant of commitment, setting it out at length, by which it appeared that the prisoner was committed by the same justice on the same day and for the same offence :—*Held*, that the second warrant of commitment being valid, the prisoner was not entitled to his discharge. *Reg. v. Richards.* 777

See also CONTEMPT.

COMPANY.

See BANKING COMPANY—RAILWAY COMPANY.

CONSIDERATION.

See BILLS OF EXCHANGE, 3, 4—CONTRACT — FREIGHT—MASTER AND SERVANT.

CONSPIRACY.

By means of Contract.

1. An indictment charging that A. and B., horse dealers, being evil disposed persons, and seeking to get their living by various subtle, fraudulent and dishonest practices, together with divers other evil disposed persons, unlawfully, fraudulently and deceitfully did combine, conspire, &c. by divers false pretences and subtle means, to obtain to themselves from C. divers sums of money of the monies of C., and to cheat and defraud him thereof, is not bad on the ground of generality.
A. and B., in concert with each other, falsely pretended to C. that a horse which they had for sale had been the property of a lady deceased, and was then the property of her sister, and was not then the property of any horse dealer, and that the horse was quiet to ride and drive, and by these misrepresentations induced C. to purchase the horse.

Held, that they were indictable for conspiracy, although the money was to be obtained through the medium of a contract.

Seemle, that they were also indictable for obtaining money by false pretences.

One of two defendants in an indictment for conspiracy died after the *venire facias* juratores was returnable and before trial; the other defendant was tried and found guilty.

Held, no mistrial, although no suggestion of the co-defendant's death had been entered on the record before trial. *Reg. v. Kenrick.* 208

2. *Seemle*, that an indictment charging the defendants with conspiring together to cheat and defraud certain subjects of the queen, being tradesmen, of goods and chattels, is sufficient, without naming the tradesmen or alleging overt acts.

An indictment, after charging as above, proceeded to allege that *A.*, one of the defendants, in pursuance of the conspiracy, fraudulently obtained on credit goods from certain tradesmen (named) and other tradesmen whose names are unknown; that *A.*, in further pursuance of the conspiracy, procured these goods to be delivered at her house; that they were not paid for; that the defendants, in further pursuance of the conspiracy, pretended that certain fictitious debts were due from *A.* to the other defendants respectively, and caused actions to be commenced and judgments obtained and writs of *fi. fa.* issued, by virtue of which the goods so obtained were taken in execution to satisfy the fictitious debts, and that the defendants did in this manner unlawfully cheat and defraud the before-mentioned tradesmen:—*Held*, that if the charging part had been insufficient, the overt acts thus stated

would have supported it, and that the concluding allegation was not a statement of a separate offence (obtaining goods by fraudulent pretences), but an unnecessary summing up of the facts stated as overt acts. *Reg. v. King.* 741

CONTEMPT.

By order of the Court of Review it was ordered that the plaintiff should pay certain costs. The party entitled to the costs afterwards petitioned the Court, reciting the above order, and the service of it on the plaintiff and his disobedience to it, and prayed that the plaintiff might be committed to prison for his contempt of the order.

Thereupon a further order issued from the Court, which, after reciting the petition and the order, proceeded to order that the plaintiff "do stand committed, &c. for his contempt in the said petition mentioned or referred to, and that a warrant do forthwith issue for that purpose."

A warrant afterwards issued, which recited that by the order last mentioned it was ordered that the plaintiff should be committed "for his contempt in the said petition mentioned or referred to," and then directed his imprisonment "until the further order of this Court."

Held, That the warrant was no justification for taking the plaintiff in custody, as the warrant referred to the order, in which there was no general adjudication of a contempt, nor any fact found, nor any thing directed to be done by the prisoner to clear himself.

That the petitioner's attorney, who had indorsed the warrant with his own name, and who had refused information as to the amount of the costs, when a friend of the

plaintiff inquired for the purpose of paying them, was liable in trespass. *Green v. Elgie.* 199

CONTRACT.

Condition—Consideration.

1. Assumpsit. The declaration stated that the plaintiff had obtained a patent for steam engines, that defendants were about to build a steam ship, that plaintiff, on the 28th November, 1836, agreed to allow them to use his patent in the construction of a pair of steam engines then about to be made for the ship, and also to use his patent in engines for any other ships thereafter, the defendants to pay 2000*l.*, viz. 1000*l.* on the 1st August, 1837, and the remainder on the 1st July, 1838; and also 5*l.* per horse power, for every engine "which should at any time thereafter be made or manufactured and used on board any other ship" of the defendants, in which the principles of the plaintiff's patent should be used or adopted, the same to be paid for on the entering into a contract with an engine maker for the manufacturing of such engine.

Held, that the 5*l.* per horse power was payable as soon as the defendants entered into a contract with the engine maker, and that it was payable, although the contract with the engine maker was afterwards rescinded, and no engine on the plaintiff's principle was either used or manufactured; for the consideration for the promise was the license to use and not the user. *Hall v. Bainbridge.* 333

See also FREIGHT.

Mutuality.

2. By an agreement called a "pit bond," the owners of a coal pit retained and hired the plaintiff for a year; the plaintiff, "during

all the times the pit shall be laid off work, to continue the servant of the said owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit," and at certain wages.

Held, that under this agreement the pit owners were not bound to employ the plaintiff for a reasonable number of working days during the year. *Williamson v. Taylor.* 389

See also MASTER AND SERVANT.

Sale of Machinery—Fitness for the Purpose.

3. Where defendant orders of plaintiff a machine, previously known and ascertained, for which plaintiff had a patent, it is no answer to an action for the price of the machine, that it does not answer the purpose specified in the patent, although it is not shewn that the defendant has had previous opportunities of exercising his judgment as to the usefulness of the machine. *Oliphant v. Bayley.* 373
- Criminal liability, where fraud committed by means of contract, see CONSPIRACY.

CONVICTION.

See COMMITMENT—JUSTICE, 1.

CORPORATION.

See ASSUMPSIT—BOROUGH—GAOL.

CORRECTION, HOUSE OF.

Appointment of Chaplain. See GAOL.

COSTS.

On lower Scale.

1. Where an action of assumpsit was tried at the assizes, and the plaintiff recovered a verdict for 2*l.*, and the judge refused to certify that

it was a proper cause to be tried before him, the costs of the attorney for attendance at the assises are to be taxed on the lower scale according to the directions of schedule 3 of the rule of Hilary Vacation, 4 *Will.* 4, as those directions apply to country as well as to town causes. *Gibbs v. Whatley.* 442

Where Damages under 40s.

2. Where a plaintiff in trespass has obtained judgment on demurrer, and, on the trial of a writ of inquiry to assess the damages, the jury give less than 40s., the plaintiff is not deprived of his costs by 3 & 4 *Vict.* c. 24, s. 2. *Taylor v. Rolfe.* 229
See also PRACTICE, 4.

Payable by Person not Party to the Rule.

3. Where an order for payment of money out of a borough fund is brought up by certiorari, under 7 *Will.* 4 & 1 *Vict.* c. 78, s. 44, and quashed with costs, the Court should decide, when the quashing is ordered, who is to be charged with the costs as "prosecutor" of the order, and the name of such party should be inserted with the rule.

Where this practice had not been followed, and rule for quashing such orders was merely drawn up with costs "to be paid by the prosecutors," without naming them, the Court refused, on motion by the party who had obtained the rule for quashing, to issue attachment against certain persons who had made affidavits in opposition to the certiorari, and placed themselves, according to the argument of the party moving, in the position of "prosecutors" of the orders quashed. *Reg. v. Dunn.* 737
Costs of bastardy order. See POOR, 29.

Mandamus to pay costs of road indictment. See HIGHWAY, 2, 3.

See also ATTACHMENT.

Costs in error. *Newlands v. Holmes.* 647

COUNCIL.

See BOROUGH—GAOL.

COVENANT.

See MASTER AND SERVANT.

CRIMINAL INFORMATION.

See CRIMINAL LAW, 5.

CRIMINAL LAW.

Quashing Indictment.

1. By 3 & 4 *Will.* 4, c. 51, s. 29, a person making a false oath before any surveyor or inspector-general of the customs, on inquiries made by him for ascertaining the truth of facts relative to the customs, or the conduct of officers employed therein, is made liable to the pains and penalties of perjury.

By 3 & 4 *Will.* 4, c. 53, s. 112, "No indictment shall be preferred, or suit commenced, for the recovery of any penalty or forfeiture under this or any other act, relating to the customs or excise, (except in the case of persons detained and carried before one or more justices in pursuance of this act,) unless such suit shall be commenced "in the name of the attorney-general, or under the directions of the commissioners of customs or excise, or in the name of one of their officers, under their directions." The Court refused summarily to interfere by quashing an indictment under the first mentioned section, or by staying the proceedings, where it appeared that the indictment had not been authorised under the last mentioned section. *Reg. v. Burnby.* 362

Venue.

2. A count in an indictment for a misdemeanor, with a statement of venue in the margin, charging, without any other statement of place, that the defendants, together with divers evil-disposed persons, unlawfully endeavoured to excite her Majesty's subjects to disaffection, &c.:—*Held* bad, in arrest of judgment, for want of statement of venue in the body of the indictment; the defect not being cured by 7 *Geo.* 4, c. 64, s. 20.

Another count, with a statement of venue in the margin, stated that certain persons (without any statement of place) unlawfully and tumultuously assembled, &c.; and that the defendants (with a statement of place) did "unlawfully aid, abet, comfort, support and encourage the said persons to continue such unlawful assemblies.

Seem, that such count would have been bad at common law for want of statement of venue; but that in this instance, it was the "want of a proper or perfect venue," and it was therefore cured by 7 *Geo.* 4, c. 64, s. 20. *Reg. v. O'Connor.*

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3. Where in an indictment, after describing the defendant as "of the parish of A. in the county of B.," the offence is laid to have been committed "at the parish aforesaid," omitting any statement of county, this statement of the venue, if defective, is cured by 7 *Geo.* 4, c. 60, s. 24, after verdict, the case having been tried by a jury of the county first named.

Quare, whether the statement be defective. *Reg. v. Albert.* 89

4. Where an indictment, which had the marginal venue "Central Criminal Court," and alleged, according to statute 4 & 5 *Will.* 4, c. 36, that the offence was committed within the jurisdiction of the Central Criminal Court, was removed

by certiorari, and tried in Middlesex.

Held, that judgment must be arrested, as there was no allegation that the offence had been committed in that county.

The Court refused to remove the objection by entering, *nunc pro tunc*, a suggestion directing a trial at Middlesex. *Reg. v. Stowell.* 189

Criminal Information.

5. Spoken words, charging a magistrate with corrupt and oppressive conduct, are not the subject of criminal information, unless they are spoken at a time when he is in the actual execution of his office. *Ex parte The Duke of Marlborough.* 720

Right of Prisoner to Copies of Depositions.

6. A person committed to prison for further examination only, and not finally committed for trial, has no right to copies of the depositions under stat. 6 & 7 *Will.* 4, c. 114, s. 3.

Depositions should be signed by the magistrate and witnesses as soon as they are taken. *Reg. v. The Lord Mayor of London.* 484
See also COMMITMENT—BRIDGES—CONSPIRACY—HIGHWAY—OATHS.
Costs of Indictment. See HIGHWAY, 2, 3.

CUSTOM.

Evidence of custom of trade. See EVIDENCE, 1.

CUSTOMS.

Grant of. See GRANT.
Prosecution by commissioners of. See CRIMINAL LAW, 1.

DAMAGES.

On writ of inquiry, materiality of sum in declaration. See PLEADING, 2.

Smallness of, with respect to motion for new trial. See **NEW TRIAL**.

DEATH.

Suggestion of death of co-defendant.
See **CONSPIRACY**, 1.

DEBT.

On foreign judgment. See **PLEADING**, 1.

Materiality of Sum in Declaration.

Declaration in debt stated that defendant, by mortgage deed dated the 21st June, 1839, covenanted to pay 900*l.* and interest, at 5*l.* per cent., on the 21st June then next ensuing; that defendant made default, and that there was then due on account of the said sum of 900*l.* and interest, a large sum of money, to wit, the sum of 1200*l.*

On motion in arrest of judgment, it was objected that, as principal and one year's interest only could be recovered as a debt, the declaration was bad for alleging 1200*l.* to be due on account of principal and interest.

Held, that it did not appear from the declaration that only one year's interest was due on the 21st June, 1840, though that was the day on which it was to be paid; and that, even if it did, it still appeared that there was a good cause of action in debt for 945*l.*, and the averment that more was due might either be rejected as surplusage for the excess, or cured by entering a remittitur for such excess.
Simmons v. Wood. 355

DECEIT.

See **CARE**.

DEED.

Liability of Corporation without deed. See **ASSUMPSIT**.

DEFAMATION.

1. *Libel imputing Fraud to Plaintiff in the Conduct of an illegal Transaction.*

1. In case for libel, the declaration shewed that the plaintiff was a member of the Jockey Club, and subscriber to the Derby Stakes at Epsom, and had withdrawn a horse which he intended to run; it then set out words imputing to the plaintiff that he had entered the horse to run for those stakes, and afterwards withdrawn him for the purpose of getting an unfair advantage over parties with whom he had heavy wagers on the result of the race:—*Held*, that the action would lie, and this whether or not the transactions in which the declaration showed the plaintiff to be engaged were legal.

A witness, a member of the Jockey Club, was asked whether in his opinion the conduct thus imputed to the plaintiff was honourable, which he answered in the negative:—*Held*, that the evidence was admissible, the question having been put in re-examination, to explain a former statement of the witness on cross-examination, that entering and withdrawing a horse after betting on it was not contrary to any regulation of the Jockey Club. *Greville v. Chapman.* 553

2. *Respecting Plaintiff in his Trade.*

2. A declaration in case for libel averred that the plaintiff was an engineer and millwright; that he was the inventor and proprietor of a design for modelling articles of metal; that he had duly registered this design; that he published the design, and published and sold divers articles of manufacture on which it was used; that the plaintiff had on sale articles called "self-acting tallow syphons and lubricators;" that the defendant falsely and maliciously published in a newspaper of and

concerning the plaintiff in his trade, and of and concerning the articles, the following libel. The declaration then set out the libel, of which these are the material parts: "This is to caution parties employing steam power from a person" (meaning the plaintiff) "offering what he calls self-acting tallow syphons or lubricators" (meaning the said designs and the said articles, &c.) "*Robert Harlow*," (meaning himself the defendant,) "brass-founder, takes this opportunity of saying that he has to offer an improved lubricator, &c. Those who have already adopted the lubricators" (meaning the said design of the plaintiff, and the said articles, &c.) "against which *R. H.* would caution, will find that the tallow is wasted, instead of being effectually employed as professed."

Held bad on general demurrer, there being nothing to connect the libel with the earlier inducements in the declaration, and the words themselves importing no more than a caution against the goods, not an imputation on the plaintiff; and that the defendant did not by demurring admit that the words were published falsely and maliciously of the plaintiff, and therefore a libel. *Evans v. Harlow*. 507
Criminal information for words. See CRIMINAL LAW, 5.

Jurisdiction of Ecclesiastical Court in cases of defamation. See ECCLESIASTICAL LAW.

DEFENDANT.

Suggestion of co-defendant's death. See CONSPIRACY, 1.

DEMURRER.

Costs on writ of inquiry after judgment on demurrer. See COSTS, 2.

DEPOSITIONS.

When to be signed by justice. See CRIMINAL LAW, 6.

Jurat to examination before justices. See POOR, 8.

DETAINER.

Trespass or case for detainer. See ARREST.

DISCONTINUE.

When plaintiff not permitted to. See PRACTICE, 6.

EASEMENT.

See PRESCRIPTION.

ECCLESIASTICAL LAW.

Defamation.

Where a suit is instituted in the Spiritual Court for defamation, for words containing both imputations for which an action would lie, and other imputations forming matter of ecclesiastical cognizance, if the words are libelled together as forming one charge, and the sentence appears to proceed on all the words, a prohibition will go.

And this although the party aggrieved by the defamatory words was a clergyman; the rule, if it exists, that the civil and ecclesiastical courts have concurrent jurisdiction when a spiritual person is aggrieved, applying only where he is aggrieved in his ecclesiastical character, as by words spoken respecting his ecclesiastical ministration. *Evans v. Gwyn*. 705
See CHURCH RATE.

ELECTION.

See BOROUGH.

ELEGIT.

See SHERIFF, 2.

ERROR.

Costs in, where plaintiff is delayed of his execution. *Newlands v. Holmes*. 647

ESTATE.

See **POWER.**

EVIDENCE.

See **BANKING COMPANY**—**BANKRUPTCY**, 6—**BILL OF EXCHANGE**, 4—**BRIDGE**—**DEFAMATION**, 1—**INN-KEEPER**—**PLEADING**, 2, 3, 4—**POOR**, 21, 22—**USURY**.

1. Where by written contract a workman engages to work at a particular trade for a year, parol evidence may be given that by the custom of the trade the workman is entitled to certain holidays in the course of the year, for, as the contract is in general terms and does not specify the particular times of service, such evidence explains and does not contradict the written contract. *Reg. v. Stoke-upon-Trent.* 357

2. Borough freeholders, claiming a common right of fishery, had subscribed an agreement to support each other in bearing the expenses of "defending any prosecution for fishing in the common water," &c.

Held, on a question arising before stat. 6 & 7 *Vict.* c. 85, as to the competency of a party to the agreement to be a witness in an action of trespass brought against some of the other parties to it, that he was a competent witness, as the word "prosecution" must be taken to apply to criminal proceedings only. *Rawlins v. Jenkins.* 219

EXCISE.

Prosecution by commissioners of excise. See **CRIMINAL LAW**, 1.

EXECUTION.

See **CERTIFICATE**—**CAPIAS AD SATISFACIENDUM**—**SCIRE FACIAS**—**SHERIFF**—**WARRANT OF ATTORNEY**.

An execution creditor seized partner-

ship property under a *fi. fa.* against one of the partners. Afterwards a joint fiat in bankruptcy issued against the firm. The property was then sold "without prejudice" to the rights of the execution creditor, and the proceeds received by the assignees of the bankrupts.

Held, that, as the interest applicable to the execution would only be in the surplus coming to the execution debtor after payment of the partnership debts, and must depend on the settlement of accounts, which a court of law is not competent to take, the execution creditor could not maintain an action for money had and received against the assignees. *Garbett v. Veale.* 458

"Execution had," meaning of. *Newlands v. Holmes.* 647

FALSE IMPRISONMENT.

What professional acts make a person liable as an attorney to an action for. See **CONTEMPT**.

FALSE PRETENCES.

See **CONSPIRACY**, 1.

FALSE REPRESENTATION.

Liability for, without fraud. See **CASE**.

FIAT.

Evidence of. See **BANKRUPTCY**, 6.

FIERI FACIAS.

See **EXECUTION**—**SCIRE FACIAS**.

FEME COVERT.

Attachment for costs. See **ATTACHMENT**.

Separation from husband. See **POOR**, 15.

Lease to her husband. See **POWER**.

FOREIGN JUDGMENT.

Action on. See **PLEADING**, 1.

FRAUDULENT PREFERENCE.

See BANKRUPTCY, 1.

FREIGHT.

A declaration on a charter-party stated that it was agreed between the plaintiff and the defendants that the plaintiff's ship should load from the agents of the defendants at Nantes a full cargo of wheat, and deliver the same at London on being paid freight; that the ship went to Nantes, and that defendants refused to load a cargo.

Plea, that the charter-party was entered into at London while the ship was at London, and that the plaintiff, without defendants' consent, sailed from London to Newcastle, and thence to other places than Nantes, by means of which the ship did not arrive at Nantes "within a reasonable and proper time in that behalf," but "a long and unreasonable time, to wit, thirty-eight days, after she would have arrived at Nantes according to the usual length of the voyage, if she had sailed direct."

Held, on special demurrer, that the plea was bad, as it did not appear that defendant had, in consequence of the delay, lost the benefit of the voyage. *Clipsam v. Vertue*. 343

GAME.

Poaching.

An information by Sir O. M. against a party for trespass in pursuit of game, after stating the particulars of the trespass, proceeded thus, "And the said information having been also verified upon the oath of W. A.," the said Sir O. M. prays for a summons against the accused party.

Then followed the signatures of Sir O. M. and W. A., and the in-

formation concluded thus, "Exhibited by Sir O. M., and sworn before me the day and year, &c.," which was signed by the magistrate.

Held, that this information did not shew that the charge contained in it had been sworn to by W. A., as the meaning of "verified the information" was equivocal, and it was not clear that the word "sworn" at the end applied to him; and therefore the accused party could not be summoned under stat. 6 & 7 Will. 4, c. 68, s. 9, which dispenses with an oath by the informer, "provided that, before any proceedings shall be taken on such information, either for summoning the party accused or compelling his appearance to answer the same, the charge contained in such information shall be deposed to on the oath of some other person or persons," &c. *Reg. v. Scotton*. 501

GAMING.

Horse Race.

1. A declaration stating that the plaintiff and defendant were subscribers to 50*l*. stakes in a certain horse race, that the plaintiff named four horses, and the defendant three, that one of the plaintiff's horses won, and the defendant thereby became liable to pay three sums of 50*l*. as and for the stakes payable in respect of the horses named by him: *Held* bad, as averring a wager within the terms of the provisions of 16 Car. 2, c. 7, s. 3, that if any person shall play, &c. at the games therein specified, (including horse races,) and lose upwards of 100*l*., "upon ticket or credit or otherwise," and shall not pay at the time when he shall lose the same, the party who loses shall not be compellable to pay the same. *Bentinck v. Connop*. 538

Bubble Bet.

2. Plaintiff wagered with defendant that defendant would pass his examination as attorney; defendant passed. Assumpsit being brought on the wager, *held*, on demurrer to the declaration, that the wager was void, inasmuch as it was of the nature of a bubble bet, defendant having it in his power to win if he pleased. *Fisher v. Waltham*. 142

GAOL.

Appointment of Chaplain to Borough Gaol.

Prior to the 5 & 6 Will. 4, c. 76, the city of Bath was incorporated by the name of the Mayor, Aldermen and Citizens of the City of Bath. The charter contained the grant of a gaol, and a limited criminal jurisdiction to be exercised by the recorder and the corporate justices, but not extending to felonies. It also authorised the mayor, aldermen and citizens annually to elect two of themselves to be bailiffs of the said city, and directed that the bailiffs for the time being should be keepers of the gaol of the city. After the passing of the Municipal Corporation Act, the new corporation received the grant of a separate court of quarter sessions, with power to try felonies, and certain persons were appointed justices for the city by commission; but the corporation still continued to elect one bailiff, who continued to be the keeper of the gaol, and appointed the gaoler. In 1842 a new gaol and house of correction was built under the provisions of the 1 Vict. c. 71, to which the town council had appointed a chaplain.

Held, that the right to appoint the chaplain of the new gaol and house of correction, under statute 2 & 3 Vict. c. 56, s. 15, was in the town council, by virtue of their

authority to appoint the keeper of the prison, and not in the borough justices. *Reg. v. Bishop of Bath and Wells*. 173

GRANT.

Grant of Port Dues.

The corporation of Exeter has been for a long series of years in the receipt of "petty customs" or "port dues," levied on goods imported at Teignmouth. Teignmouth is a smaller port, member of the larger port of Exeter. The "petty customs" of the port of Exeter were granted to the corporation of Exeter by ancient charter, as a part of the fee farm of that city.

Held, that under these circumstances a legal origin might be presumed for the payment of these customs or dues, although neither the crown nor the corporation of Exeter were at any time owners of the soil of the port of Teignmouth, and although no consideration for them was shewn in the shape of repairs, or any other public benefits performed by the corporation at Teignmouth. *Seemable*, that if it had been shewn that the ownership of the port carried with it certain duties, e.g. repairs, &c., and that these duties had not been performed, such non-performance would not have been an answer to the present action. *Mayor, &c. of Exeter v. Warren*.

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GUARANTEE.

Right of attornies in partnership to bind firm by guarantee. See ATTORNEY, 2.

HEARING.

What amounts to a hearing of a case. See POOR, 29, 30, 31.

HIGHWAY.

Indictment for Non-repair of Road encroached on by the Sea.

1. Indictment in the common form for not repairing a highway, alleging defendant's liability *ratione tenuræ*.

A special verdict found that defendant's land adjoined the sea; that anciently a highway went over this land and that defendant's predecessors had repaired it, &c.; that within living memory the sea had encroached, and that the ancient highway was covered by the sea; that defendant's predecessors had from time to time gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had shortly before the finding of the indictment made an encroachment and washed away part of the highway alleged to be out of repair, and washed away large quantities of the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank of about seventy feet.

Held, that defendant was entitled to judgment. *Reg. v. Bamber.* 367

Costs of Indictment.

2. Where a judge of assise, after trial of an indictment for non repair of a road under stat. 5 & 6 *Will.* 4, c. 50, s. 95, makes an order that the costs be paid by the parish, but does not insert the amount of costs in the order, nor ascertain and fix the amount either then or

at any subsequent time, this Court will not enforce such an order by a mandamus. *Reg. v. Clark.* 687

3. Where under stat. 5 & 6 *Will.* 4, c. 50, ss. 94 and 95, justices at special sessions make an order, directing an indictment to be preferred for non-repair of a highway, the order must state that the special sessions were held within the "division in which the highway was situate."

An order of quarter sessions awarding the costs of such an indictment was held void, where the order of special sessions was defective in this respect, although in point of fact the special sessions, which directed the indictment, had been held in the proper division, and the order of quarter sessions recited that they had been so held. *Reg. v. Martin.* 386

Highway Rate—Woods usually rated.

4. By stat. 5 & 6 *Will.* 4, c. 50, s. 27, the surveyor of the highways is directed to make a rate on all property liable to be rated to the relief of the poor, "provided that the same rate shall also extend to such woods, mines and quarries of stone, or other hereditaments, as have heretofore been 'usually rated' to the highways."

Held, on a question as to the liability of certain woods in a parish to the highway rate, that the words "usually rated" meant "usually rated" in that particular parish. *Reg. v. Rose.* 300
Removal of obstruction in highway. See JUSTICE, 1.

HIRING.

See CONTRACT, 2—MASTER AND SERVANT—POOR, 11.

HORSE RACE.

See GAMING—DEFAMATION, 1.

HOUSE OF CORRECTION.

Appointment of chaplain. See GAOL.

HUSBAND AND WIFE.

See ATTACHMENT—POOR, 15 —
POWER.

ILLEGALITY.

Defamation in respect of an illegal transaction. See DEFAMATION.

INDICTMENT.

See BRIDGE—CONSPIRACY—CRIMINAL LAW—OATHS.

INFANCY.

See NECESSARIES.

INFORMATION.

Criminal information. See CRIMINAL LAW, 5.

Information in the nature of a quo warranto. See BOROUGH.

INNKEEPER.

The horse of a guest in a common inn was stabled with another horse, and kicked and injured by it:—*Held*, that, though these facts raised a presumption of negligence against the innkeeper, he might defend himself by showing that due care had been used; for that he was not liable without negligence. *Dawson v. Channey.* 348

INQUIRY, WRIT OF.

Amount of damages, materiality of sum in declaration. See PLEADING, 2.

Costs where damages under 40s. after judgment on demurrer. See COSTS, 2.

IRREGULARITY.

Setting aside ca. sa. See CAPIAS AD SATISFACIENDUM.

ISSUE.

Between partners. See BANKING COMPANY.

JUDGE.

His order when conclusive. See PRACTICE, 3, 4.

Order for costs at the assises. See HIGHWAY, 2.

JUDGMENT.

Satisfaction piece, regula generalis as to, 783.

Judgment at the assizes on a criminal case removed by certiorari. See OATHS.

"Amending" judgment. See OATHS. Judgment by default. Materiality of sum in declaration. See PLEADING, 2.

Assignment of breaches after judgment by default. See BOND.

JURAT.

See BANKING COMPANY—POOR, 8.

JURISDICTION.

Of Ecclesiastical Court. See ECCLESIASTICAL LAW.

Of judge as to law and fact. See NECESSARIES.

As to conclusiveness of his orders at chambers. See PRACTICE.

As to order for costs of indictment. See HIGHWAY, 2.

As to venue. See CRIMINAL LAW.

Of justice. As to administering oaths. See OATHS.

Generally. See POOR.

Objection to jurisdiction waived by entering on case. See POOR, 30, 31.

JUSTICE.

Conclusiveness of Recitals in Order—Obstruction to Highway.

Under the Highway Act (stat. 5 & 6 Will. 4, c. 50, s. 73, which enacts

that if any timber, &c. is laid upon any highway so as to be a nuisance, and shall not after notice be removed, it shall be lawful for the surveyor, by order in writing from a justice to remove the timber, &c.) an order of a justice, reciting that the plaintiff's timber was laid on the highway and directing its removal, is conclusive to shew that the locus in quo was a highway, so that the plaintiff in an action of trespass against the justice who made the order cannot dispute his jurisdiction on the ground that the locus in quo was not a highway. *Mould v. Williams.* 681

Fees of Justices' Clerk.

2. Fees which a justices' clerk, in a borough, is authorised to take by a table regularly allowed and confirmed under 5 & 6 Will. 4, c. 76, s. 124, in respect of charges against persons apprehended and brought before the borough justices by constables appointed by the watch committee, disposed of by such justices, and which fees the clerk to the justices cannot recover from such persons, or other parties, either on account of their not being specifically imposed on them by acts of parliament, or from their inability to pay, are "expenses necessarily incurred in carrying into effect the provisions of the act" under section 92, and a mandamus will go to direct their payment out of the borough fund. *Reg. v. Mayor, &c. of Gloucester.* 677
- Criminal information against, for refusing bail. See BAIL.
- Indictment against, for administering oaths without jurisdiction. See OATHS.
- Right of borough justices to appoint chaplain to gaol. See GAOL.
- Criminal information for words spoken of justice. See CRIMINAL LAW, 5.
- See also generally COMMITMENT—HIGHWAY—POOR.

LANDLORD AND TENANT.

Non Tenuit—Riens in arrear.

Where the lessor of premises at a rent payable quarterly had given a written authority to a mortgagee to receive rent from the lessee, and the mortgagee had given notice to the lessee to pay such rent to no one but him, and the lessee had paid the mortgagee such rent from time to time, and there was still an arrear of interest due from the lessor on the mortgage:—*Held*, that these facts furnished no defence under non tenuit and riens in arrear, pleaded by the lessee to an avowry of the lessor in respect of a quarter's rent which the lessee had not paid to any one. *Wheeler v. Branscombe.* 406

LEASE.

See POWER.

LIBEL.

See DEFAMATION.

LIMITATIONS, STATUTES OF.

Real Property.

Stat. 3 & 4 Will. 4, c. 27, s. 7, which enacts "that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, and of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have first determined," does not apply where the tenancy at will was determined before the passing of the act. *Doe d. Evans v. Page.* 601

See also ANNUITY—BANKRUPTCY, 3.

LUNATIC.

See POOR.

MAGISTRATE.See CRIMINAL LAW — JUSTICE —
OATHS—POOR.**MALICE.**How far malice per se makes an act
illegal. See ARREST.**MAINTENANCE.**Instigating actions. See REASONABLE
AND PROBABLE CAUSE.**MANDAMUS.***Costs of.*

Semble, that under 1 Will. 4, c. 21, the Court has power to order the costs of the application for a writ of mandamus to erase an entry of quarter sessions, enter continuances, and hear an appeal, and of the writs, to be paid by the parish officers of the respondent parish, where the justices have made a return to the writ, which has been supported on behalf of the respondents, and on which a peremptory mandamus has been awarded, issued, and obeyed.

But the Court refused to make such an order in a case where the original entry had been made in pursuance of an established, although improper, practice of the quarter sessions. *Reg. v. Justices of West Riding.* 590

Mandamus to pay costs of road indictment. See HIGHWAY, 2.

MASTER AND SERVANT.

Liability of Master to continue Servant in his Employment.

1. Covenant. The declaration stated that by indenture between defendant of the first part, J. D., son of

plaintiff, of the second part, and plaintiff of third part, plaintiff covenanted that his son should be assistant to the defendant, a dentist, for five years, and do all such service as defendant should order to be performed in the way of his art; that defendant, for the services to be done by the son, covenanted during the term, and in case the son should perform his part of the agreement, that he defendant would pay the son a certain sum weekly during the term as compensation for the services aforesaid. That the son entered upon the service, and that he and the plaintiff performed their part of the agreement, and were ready and willing to continue such performance during the term.

Breach: that defendant refused to permit the son to continue in the service and dismissed him.

Judgment arrested on the ground that the breach was ill assigned, as the declaration contained no implied covenant by the defendant to retain the son in the service during the five years. *Dunn v. Sayles.* 579

2. It is covenanted and agreed between A. and B. that A. shall manufacture cement for the use of B. of a specified quality; that B. shall pay A. a certain weekly sum for two years from the agreement, and another weekly sum for one year after; and shall receive A. into partnership in the business of manufacturing cement at the end of three years; and that A. shall instruct B. in the art of manufacturing cement.

Held, on action brought by A., assigning as a breach of this agreement that B. wrongfully discharged him, the plaintiff, from his service, and from manufacturing cement for the use of the defendant, and from any longer instructing the plaintiff in the art of manufacturing

cement, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years between the parties, and therefore the action was not maintainable. *Aspdin v. Austin.* 515
 See also CONTRACT, 2.
 Commitment of workman for leaving his work. See COMMITMENT.

MAYOR.

See BOROUGH.

MEETINGS.

Duty of chairman in signing minutes.
 See RAILWAY, 2.

MINING.

Conflicting rights of miner and sur-
 facer. See PRESCRIPTION, 2.

MINUTES.

Signature to by chairman of meet-
 ing. See RAILWAY, 2.

MONEY HAD AND RECEIVED.

See ANNUITY — ASSUMPSIT — EXE-
 CUTION.

MORTGAGE.

Payment of rent to mortgagee. See
 LANDLORD AND TENANT.

MUNICIPAL CORPORATION ACT.

See BOROUGH—GAOL.

MUTUALITY.

See CONTRACT—MASTER AND SER-
 VANT.

NECESSARIES.

On an issue raised on the replication
 of "necessaries," to a plea of in-
 fancy, in an action against an un-

dergraduate of Oxford, for a con-
 fectioner's bill, consisting of items
 partly for the defendant's own use
 and partly for the entertainment of
 his friends, held a misdirection to
 leave to the jury whether the arti-
 cles supplied were necessaries suit-
 able to the then degree, &c. of the
 defendant, inasmuch as such arti-
 cles, when supplied to an infant at
 college in statu pupillari for the
 entertainment of others, cannot be
 necessaries.

It is for the Court to decide
 whether the particular articles are
capable of being necessaries, ac-
 cording to the position of the de-
 fendant, and for the jury, within
 this limit, to decide whether they
 are so or not. *Wharton v. Mac-
 kenzie.* 544

NEGLIGENCE.

Onus of proving. See INNKEEPER.

NEW TRIAL.

1. *Smallness of Damages.*

In case for negligent driving, with a
 plea of not guilty, where the jury
 found for the plaintiff with one
 farthing damages, although it was
 proved that his leg had been broken
 by the accident, the Court granted
 a new trial on payment of costs.
 The rule that the Court will not
 grant a new trial merely on ac-
 count of the smallness of the
 damages, does not extend to the
 case of a severe personal injury.
Armitage v. Hayley. 189

2. *Intended motion for.*

When judgment passed at the assises
 in a criminal case removed by a
 certiorari. See OATHS.

NON EST INVENTUS.

Duty of sheriff as to arrest, when
 directed to return non est inventus.
 See SHERIFF, 3.

NON TENUIT.

See LANDLORD AND TENANT.

NOTICE.

Notice of action. See RAILWAY COMPANY, 1.

Notice of appeal. See POOR.

Notice of election. See BOROUGH, 1.

NUNC PRO TUNC.

Suggestion on indictment removed by certiorari, for the purpose of removing objection to venue. See CRIMINAL LAW, 4.

OATHS.

Oath administered by Justice without Jurisdiction—Judgment in a criminal Case on a Queen's Bench Record.

By 5 & 6 Will. 4, c. 62, s. 13, it is enacted that it shall be unlawful for any justice of the peace or other person to administer, &c. or receive, &c. any oath, affidavit, or solemn affirmation, "touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being." A proviso follows, containing several exceptions.

Held, that a count, charging the defendant with administering an oath touching certain matters and things whereof he, the defendant, had not any jurisdiction or cognizance by any statutes in force at the time being, the same oath not being before any justice, &c. (going on to negative the exceptions in the proviso), was bad, for not shewing the subject matter touching which the oath was administered, so as to enable the Court to draw the legal inference that it was one of which the defendant had not cognizance.

But *semble*, per *Patteson*, *Williams*, and *Coleridge* Js., that it would be unnecessary to set out the oath administered *verbatim*.

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Under 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, where judgment in a trial on a Queen's Bench record has been pronounced at the assises, the Court above may "amend" the judgment by setting it aside, if the indictment be defective.

Where a verdict has been given for the crown in such trial, and the defendant desires to have judgment pronounced at the assises, it is the proper course for his counsel to state at the same time that he intends to avail himself of the provision of sect 9 by moving the Court above for a new trial on the ground of misdirection, or in arrest of judgment. *Reg. v. Nott*. 103

OCCUPIER.

Occupation to qualify burgess. See BOROUGH, 2.

OFFICE.

Proof of authority to sign fiats. See BANKRUPTCY, 6.

Dismissal from Office without opportunity of answering Charges.

Mandamus to defendant as vicar of the parish of St. Faith, Overbury, to restore the prosecutor to the office of clerk and sexton of the said parish. The return, after alleging the right of the defendant as vicar to remove for lawful cause, and upon any vacancy legally arising to nominate, appoint and admit a legal and discreet person in that behalf, stated the dismissal of the prosecutor by the defendant for various acts of misconduct, alleging them to have been done by the prosecutor in the presence and hearing of the defendant, and also the appointment of another person by the defendant in his place. The prosecutor, in his first plea, admitted the right as alleged by the vicar, and the appointment of another person as clerk in his

place, but pleaded *de injuriâ* as to the residue of the return; and pleaded, secondly, that he was not before the removal from his office summoned by the defendant to answer or explain the charges and cause of dismissal. Demurrer.

Held, first, that the return was bad, for not shewing that the prosecutor had had an opportunity of answering the charges made against him before dismissal; secondly, that the second plea only admitted the truth of the charges for the purposes of that plea, and that the whole record shewed no such admission, as the truth of the charge was put in issue by the plea *de injuriâ*. *Reg. v. Smith*. 564

OFFICIAL ASSIGNEE.

His duty in paying money into the bank. See *BANKRUPTCY*, 4.

ORDER.

Judge's order. See *PRACTICE*.

Justice's order conclusive. See *JUSTICE*, 1.

PARISH.

Effect of appointing separate overseers to townships upon a pauper's settlement. See *POOR*, 25.

PARISH CLERK.

Tenure of his office. See *OFFICE*.

PARTNERSHIP.

Action against Partner.

The accounts of a coaching concern, in which several persons were interested as contractors with each other to horse the coaches on different portions of the road, were referred at stated periods to a person who adjusted them, and, after ascertaining how much each had received and disbursed, divided the profits among them according to

their respective interests, directing those who had money to pay to the partnership, to hand it over to those who had to receive.

In an action for money had and received by one of such contractors against another, an account so adjusted was offered as evidence of the balance due. It did not appear that the account had ever been assented to by the defendant.

Held, that, as the account, not having been assented to, could only be binding upon the defendant by reason of some power given to the accountant as a referee, the instrument was an award, and required a stamp.

Quære, whether, during the continuance of the partnership, an action was maintainable on such a settlement of accounts, even if it had been assented to. *Carr v. Smith*. 192

Right of partner to bind firm by guarantee. See *ATTORNEY*, 2.

Execution against partner. See *EXECUTOR*.

PAWNBROKER.

Usury.

Advances made by a pawnbroker on the deposit of goods in sums exceeding 10*l.*, and at pawnbroker's interest, are not void for non-compliance with the provisions of the Pawnbrokers' Act, stat. 39 & 40 *Geo.* 3, c. 99, the 6th section of which only extends to loans of money in sums not exceeding 10*l.* Loans of money in sums exceeding 10*l.*, and at usurious interest, secured by the deposit of goods, are protected by stat. 2 & 3 *Vict.* c. 37. *Pennell v. Attenborough*. 145

PAYMENT.

Appropriation of payments. See *BANKER*.

Appropriation of rent. See *LANDLORD AND TENANT*, 1.

PAYMENT INTO COURT.

See PLEADING, 5.

PERJURY.

See CRIMINAL LAW.

PIT BOND.

See CONTRACT, 2.

PLEADING.

As to criminal law pleading, see (with respect to venue) CRIMINAL LAW, 2, 3, 4. See also BRIDGE—CONSPIRACY, 2—OATHS.

DECLARATION.

Foreign Court Judgment.

1. In a declaration in debt on the judgment of a foreign Court, it is not necessary to state that the Court had jurisdiction over the parties or the cause. *Robertson and another v. Struth.* 772

Materiality of Sum.

2. Assumpsit on an agreement for the purchase of certain real property, stated in the declaration to have been put up for sale in pursuance of an order under the hands and seals of the Poor Law Commissioners. The declaration set out the conditions of sale, one of which was, that the highest bidder should be the purchaser, and then averred that the defendant was the highest bidder, and became the purchaser at and for a certain large sum of money, *to wit, the sum of 172l.*

After judgment for the plaintiffs on demurrer, a writ of inquiry issued to assess the damages.

Quære, whether, without putting in evidence the agreement to purchase, the plaintiffs would be entitled to more than nominal damages.

Held, that such agreement does not require to be stamped, but is exempt from duty under the 86th section of statute 4 & 5 Will. 4, c. 76. *Guardians of Banbury Union v. Robinson.* 92

See also DEBT.

Averment of presentment, when unnecessary. See BILL OF EXCHANGE, 2.

Libel of plaintiff "in his trade." See DEFAMATION, 2.

PLEAS.

Plea in abatement. See SCIRE FACIAS.

NOT GUILTY.

3. In case for the seduction of the plaintiff's daughter and servant, not guilty puts in issue the fact of seduction only, and not the fact of service:

Although the declaration is in the following form:—That the defendant debauched the daughter of the plaintiff, "who then and during all the time aforesaid was and yet is the servant of the plaintiff."

A plea, therefore, traversing the service modo et formâ is not bad as an argumentative plea of not guilty. *Torrence v. Gibbins.* 226

NOT POSSESSED.

4. Under an issue in trespass *quare clausum fregit*, on a plea that the close was not the property of the plaintiff, the plaintiff's possession at the time of trespass is alone in issue, and the defendant cannot set up title to the close without pleading in confession and avoidance. *Whittington v. Bozall.* 184

PAYMENT INTO COURT.

5. *Indebitatus assumpsit*; 1st count for port tolls, 2d for manor tolls, 3d for tolls generally. Plea, payment of 10*l.* into Court as to the two last counts, and non assumpsit

as to the residue. The defendant accepted the 10*l.* and joined issue on non assumpsit. The contest at the trial was, whether the plaintiff was entitled to a port toll generally, or in so much of the port only as was his manor. The jury found he was entitled to a port toll generally, and that 8*l.* was due in respect of them.

Held, as the defendant had expressly guarded his payment of money into Court, so as to make it inapplicable to the port tolls, he could not claim to have a verdict entered for him on the first count, merely because the plaintiff might have recovered the port dues on the last count, on which a greater sum had been paid into Court than the plaintiff had recovered. *Brune v. Thompson.* 221

Non tepuit. See LANDLORD AND TENANT.

Riens in arriere. See LANDLORD AND TENANT.

Prescription, plea of. See PRESCRIPTION, 3.

REPLICATIONS.

De Injuriâ.

6. Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the defendant and *S.* carried on business at London under the style of the firm of *M.* and *S.*, and also at Rio de Janeiro under the style of the firm of *S.* and *M.*, that the defendant carried on the business of the firm in England, and *S.* at Rio. That the bill was drawn by *S.* in the name of the firm of *S.* and *M.* for a debt due by *S.* and *M.* to the plaintiff, and accepted by defendant in the name of the firm of *M.* and *S.* That after the bill was made and indorsed, and before the acceptance, the firm of *S.* and *M.* at Rio having become insolvent, the plaintiff and the other creditors of *S.* and *M.* entered into an agreement with *S.* and *M.* at Rio, by which

it was stipulated, among other things, that the holders of bills drawn by *S.* and *M.* on *M.* and *S.* should be considered as creditors for cash paid, but the respective dividends should be deposited in a bank at Rio until presentation of protests of their bills not having been paid, but, the payment in London being verified, the respective sums so deposited should be divided among the creditors: which agreement was in course of being acted upon. That defendant accepted the bill in ignorance of this agreement. That the proceedings were according to the law of Brazil, and constituted, according to that law, a discharge of the debt. Replication *de injuriâ* to this plea held bad, on the ground that the plea is in discharge, not in excuse. *Held*, also, that the plea is bad, as not showing any sufficient discharge of the London house from accepting the bill, or release from paying it. *Hartley v. Manton.* 410

7. *Held*, in *Q. B.*, in an action by the indorsee of a bill of exchange against the acceptor, where the plea stated that the bill was accepted for the accommodation of the drawer, to be by him deposited with *R.* as collateral security for a debt due from the drawer to *R.*; that before the bill became due, the drawer paid off the debt, and that *R.* afterwards indorsed to the plaintiff, in order that the plaintiff, colluding with *R.*, might recover the amount of the bill as trustee for *R.*; that the plea was in excuse, and not in discharge, so that *de injuriâ* was a good replication. *Herbert v. Sayer.* 723

Assignment of breaches in Replication. See BOND.

POINTS OF PLEADING GENERALLY.

Duplicity and Uncertainty.

8. Case by the plaintiff as sheriff against the defendant as replevin

clerk for taking insufficient sureties to a replevin bond. The declaration alleged that the plaintiff duly appointed the defendant one of his deputies for the purpose of making and granting replevins pursuant to the statute, and that the defendant accepted such appointment, and continued to be and was such deputy from the time of his appointment until and after the cause of action, and that the defendant during all that time acted and was one of the deputies of the said plaintiff.

Plea, that the plaintiff did not depute, appoint *and proclaim* the defendant one of his deputies pursuant to and according to the form of the statute, and that the defendant was not at the said time when &c., such deputy in manner and form.

Held, on special demurrer, 1st, that the defendant must be taken to be appointed under statute 1 & 2 *Phil. & Mary*, c. 12; 2nd, that the plea was bad for duplicity, and also because it traversed matter not alleged in the declaration. *Bowden v. Hall.* 54

9. Assumpsit against defendant as maker of a promissory note. Plea, that the note was made at Brussels, and that the law of Belgium is, that no person can take, or receive, or agree to take or receive more than 5*l.* per cent. for the forbearance of money lent or agreed to be lent, and that all agreements for the payment of any interest exceeding that rate, and all promissory notes made in order to secure the payment of any sum of money lent upon such an agreement, are wholly null and void. It then stated an agreement between the plaintiff and defendant in Belgium, that the plaintiff should lend money to the defendant on an usurious contract, and the making of the note to secure the loan in pursuance

of such contract. Replication, that the rate of interest in Belgium is not by the law of Belgium restricted to 5*l.* per cent., nor by the law of Belgium are notes made to secure the payment of money lent on agreement to pay more than 5*l.* per cent. interest null and void, nor did the defendant make, or the plaintiff receive, the promissory note on terms contrary to the law of the said kingdom of Belgium in manner and form. *Held*, on special demurrer, that the replication was not double or uncertain. *Be Bernardis v. Spalding.* 43

10. Assumpsit on an agreement, bearing date the 20th of September, 1840, whereby the defendant agreed to take of the plaintiff certain premises, from the 29th of September instant, at the rental of 100 guineas per annum. The declaration was dated the 16th of February, 1842, and averred that a large sum of money, *to wit*, the sum of 210*l.* of the rent aforesaid, for a long period of time, *to wit*, for two years, elapsed after the making of the said agreement, became and was due and in arrear.

Plea: 1st, as to 105*l.* parcel, payment; and 2dly, except as to the said sum of 105*l.*, parcel, &c., that no part of the said rent, except the said sum of 105*l.*, parcel, &c., had become or was due or payable under the agreement at any time before the commencement of the suit.

Held, on special demurrer to the second plea, that it was sufficiently certain to what portion of the rent that plea was pleaded, and that the plea was good. *Bright v. Beard.* 35

Uncertainty as to phrase "within reasonable time." See FREIGHT.

Argumentativeness. See 3.

Confession and avoidance, plea of, when necessary. See 4.

IN EXCUSE.

What pleas are in excuse or in discharge. See 6, 7.

ADMISSIONS IN PLEADING.

11. Assumpsit by indorsee against the maker of a promissory note payable to *P. B.* Plea. That the note was delivered to *P. B.* by the maker without consideration, and in order that *P. B.* might raise money thereon in the maker's behalf; that the plaintiff advanced upon the security of the note a certain small sum of money, to wit, 200*l.* and no more, and the note was therefore indorsed by the said *P. B.* to the plaintiff; that afterwards and before the commencement of the suit, the plaintiff was paid and satisfied by the defendant all the money by him so advanced as aforesaid, and all his right, title, and cause of action upon and in respect of the same. The replication denied the payment and satisfaction.

At the trial the defendant gave no evidence in support of his plea, and the jury found a verdict under the direction of the judge for the whole amount of the note:—*Held.* that the direction was right, and that the defendant could not avail himself of the admission in the pleadings, that only 200*l.* had been advanced, to limit the plaintiff's right to recover to that sum.

When a plea consists of two material allegations, one of which is traversed and found against the defendant, the whole plea fails. *Robins v. Maidstone.* 30

See also 2 and OFFICE.

Videlicet. See 1 and DEBT.

Practice as to assignment of breaches.

See BOND.

Amendment. See AMENDMENT.

POACHING.

See GAME.

POOR.

PARISH.

Settlement extinguished by the appointment of separate overseers for the several townships of a parish. See 25.

Guardian.

Guardian of union, in what cases incompetent to sign grounds of appeal. See 16.

Overseers.

Complaint of chargeability by single overseer. See 3.

Majority of Churchwardens and overseers must concur in giving notice of chargeability. See 6.

Signature of overseer by proxy to grounds of appeal. See 16.

Overseers' accounts.

1. The power of justices to allow accounts, submitted to them annually by overseers on their going out of office, under 50 *Geo. 3, c. 49, s. 1*, is not taken away by 4 & 5 *Will. 4, c. 76, s. 47*, which requires the overseers to have their accounts passed quarterly before an auditor appointed by the Poor Law Commissioners.

Therefore where a sum, disallowed by the auditor at his quarterly audit of such accounts, was afterwards allowed by justices in passing the annual account, the Court refused a mandamus to justices requiring them to order the overseers to pay over to their successors the sum which had been so disallowed by the auditor. *Reg. v. Dartmouth.* 126

Assistant overseer.

Complaint of chargeability by. See 4.

POOR RATE.

Rating of Railways.

2. The principle that the amount, on which a railway, when the rail-

way company are themselves the carriers, is to be assessed to the poor's rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the company from the conveyance of passengers, goods, &c., such lessee finding locomotive power, carriages, &c. subject to certain deductions, is not altered by the circumstances, that other parties are also carriers on the railway, some providing for themselves locomotive power, carriages, stations and watering places, &c. and paying tolls only to the company, and others finding carriages only, and hiring power, &c. from the company.

In such a case, the following was held to be a correct mode of rating the railway company in a parish through which a railway passes, but in which there are no stations or buildings belonging to the company.

From the gross yearly receipts of the company, including both tolls received, and also all profits derived by the company as carriers, were deducted :—

1. A per centage on the capital invested by the company in the purchase of engines and the other moveable stock necessary for their business as carriers.

2. A per centage on the same sum as for tenant's profits and profits of trade.

3. A per centage on the same sum as the annual amount of depreciation of stock beyond repairs.

4. A sum for the company's annual cost of conducting their business as carriers.

5. The annual value of the stations and other buildings rated separately from the railway.

6. A sum for renewing rails, chairs, sleepers, &c.

The several amounts of all these deductions were fixed by agreement.

The residue of the above gross sum was taken as the sum at which the railway might be reasonably expected to let from year to year.

No deduction should be made from the above sum for an annual allowance for goodwill. *Reg. v. Grand Junction Railway Company.*

237

CHARGEABILITY.

Complaint of.

3. Where the examination of an overseer purported to be his own individual complaint of a pauper's chargeability, and was signed by himself only, but the order of removal purported to have been made upon the complaint of the overseers, and, in point of fact, the complaint had been made by the single overseer on behalf of the overseers generally, and with their consent :—*Held*, that the complaint was sufficient. *Reg. v. Bedingham.*

98

4. Where the complaint on which a pauper is removed is made by an assistant overseer, *quære*, whether on appeal against the order of removal, the sessions should receive evidence to shew that the complaint was properly authorised. *Reg. v. Catteral.*

702

5. It is not sufficient evidence to ground the removal of a pauper, if the pauper, or other witnesses, state in the examinations that the pauper is "chargeable" to the removing parish; chargeability being a conclusion of law, to be inferred by the justices from evidence of the pauper's having received relief from the parish. *Reg. v. High Bickington.*

103

Same point, where the examination was headed as concerning the settlement of A. B. "charge-

able to the removing parish." *Reg. v. Lidford.* 105, n.

6. Under stat. 4 & 5 *Will.* 4, c. 76, s. 79, where notice of chargeability is given on behalf of churchwardens and overseers, the act must be authorised by the majority.

Quære, whether this must appear on the face of the notice. *Reg. v. Westbury.* 605

EXAMINATIONS.

Heading and Jurat of.

7. The first examination, on which an order for the removal of a wife and children to her maiden settlement was founded, was the examination of her husband. It purported by its heading to have been taken "touching the place of his lawful settlement," and stated that no such settlement could be ascertained; the succeeding examinations of other witnesses purported, by their respective headings, to have been taken "at the time, place, and in the manner aforesaid."

On an objection, that an inquiry, which appeared by the heading of the first examination to relate to the husband's settlement, could not justify the removal of such children as were above the age of nurture to the maiden settlement of the wife:—*Held*, that the heading sufficiently showed jurisdiction to make the order, as an inquiry into the husband's settlement was the foundation of the proceedings, for, until it appeared that his settlement could not be ascertained, the wife's settlement was immaterial, and, when it did so appear, the rest of the inquiry followed as of course. *Reg. v. Leeds.* 304

8. An examination taken for the removal of a pauper must shew, on the face of the document, that it was taken before two justices of the peace.

Where, therefore, such an examination was stated in the jurat

to be "taken before us *W. D.*, *H. T.*," not adding, "justices of the peace," &c. *Held* bad, although the examination of another witness standing first on the same sheet of paper was headed, "taken before us *W. D.* and *H. T.*, justices of the peace," &c. *Reg. v. Shipston-on-Strout.* 123

Particularity of Statement.

See 10, 18, 21, 23.

Birth Settlement, without negating derivative Settlement.

9. In the examinations on which an order was made for the removal of a pauper from a parish in Leicestershire to a parish in Northamptonshire, as being the place of his settlement ex parte maternâ, the pauper's father stated, "I am upwards of sixty-four years, and was born in London, I believe."

Held, no objection to the examinations that they did not shew any inquiry into the derivative settlement ex parte paternâ. *Reg. v. Yelvertoft.* 310

Mother's Maiden Settlement, without negating Birth of Father in Scotland or Ireland.

10. The examination of a pauper stated that his parents had no settlement, and that he did not know the place of his birth, though he had made search to ascertain it; and the examination of another witness also stated that search had been made by him for the same purpose, but without effect.

Held, that the particulars of the search need not be stated.

That the pauper's children above the age of nurture might be removed to the wife's maiden settlement, without negating his having been born in Scotland or Ireland, &c. so as to shew that they were not removable to those countries under stat. 3 & 4 *Will.* 4, c. 40, s. 2. *Reg. v. Leeds.* 304

Statement of Settlement by Hiring and Service.

11. An examination stated, "the pauper came to live with my father as farm servant, he was not engaged for any particular time; but my father found him board, washing, lodging and clothes, for so long a time as he stayed. The pauper continued in my father's service in that manner, without leaving, for more than two years, during which time he lived and slept on my father's farm. There never was any other agreement come to whilst I lived at home, but my father found the pauper with board, washing, clothing and lodging, during the said service."

Held bad, as it did not shew any hiring whatever. *Reg. v. Catterall.*
702

By renting Tenement.

12. In the examinations on which an order of removal was made, a witness stated, "On the 22d July, 1839, I let a house, situate, &c., to the pauper, at the rent of 10l. per annum. The pauper occupied the house until the 22d July, 1841, and paid me the whole rent during that time."

Held (*Coleridge J.* dissentiente,) that it did not sufficiently appear that the occupation was under the yearly renting. *Reg. v. St. Sepulchre, Northampton.*
272

13. An examination of a pauper stated that he "took a house for a year at a rent of 19l., and paid rent for the whole time of the tenancy."

Held not to shew payment of rent for a year. *Reg. v. Leeds.* 119

By Relief.

14. Relief administered by a parish to a pauper, in the house of a contractor for the maintenance of paupers, locally situated out of the parish, is no evidence of an ac-

knowledgment of settlement. *Reg. v. St. Giles in the Fields, Middlesex.*
110

ORDER OF REMOVAL.

Husband and Wife, Separation of.

15. Where husband and wife are living together, and the husband has no settlement, the wife cannot be removed to her maiden settlement, unless her consent appears upon the examinations. *Reg. v. Leeds.*
304

Order for Removal of Lunatic Pauper.

See 33, 34.

APPEAL.

Grounds of, by whom to be signed.

16. Where the signature of an overseer to the grounds of appeal against an order of removal purported to have been made by proxy, and it did not appear that the proxy had been authorised to sign, the signature was held insufficient.

A member of the board of guardians of a union, constituted by the commissioners under the 38th section of the act, is not a guardian of the parish, within the meaning of the 81st section, and not capable of signing the statement of grounds of appeal. *Reg. v. Justices of Surrey.*
106

Time for Appealing.

17. An order of removal was made October 5, suspended on the same day, and served October 14: *Held*, that the parish on which the order was served was not bound to appeal at a sessions commencing Nov. 3, inasmuch as the period of twenty-one days from the service of the order had not elapsed.

Semble, that under sect. 79 of the 4 & 5 Will. 4, c. 76, a parish has twenty-one days after the service of an order of removal to consider

whether it will appeal or not; and that, therefore, as 14 days' notice must be given of the grounds of appeal, there are in all thirty-five clear days between the service of such order and the sessions at which it is necessary to appeal. *Reg. v. Justices of Lancashire.* 488

Identification of Order of Removal in Notice of Appeal.

18. Where a notice of appeal sufficiently identifies the order of removal appealed against by reference to its date and other particulars, the notice is not bad for omitting to give the names of the justices who made the order. *Reg. v. West Houghton.* 388

Appeal for the sake of Costs, after Supersedeas of Order of Removal.

19. Where an order of removal had been superseded, *held*, that the quarter sessions were nevertheless bound to allow an appeal to be entered against it, for the purpose of getting the proper amount of costs allowed, although the respondents had tendered the appellants before sessions a sum larger than that which, by a standing order of the Court of Quarter Sessions in question, was allowed on the trial of appeals against orders of removal.

Semble, that the Court of Quarter Sessions ought to exercise a discretion upon the circumstances of each particular case as to the amount of costs which it awards to parties to appeals against orders of removal. *Reg. v. Merionethshire.*

121

Confirmation of Order of Removal, and Order for Costs, where no Appeal entered.

20. After service of notice and grounds of appeal against an order of removal, and of notice of intention to try at the next sessions, a coun-

termand of the notice of appeal and of notice of trial was served, but not in time according to the practice of the sessions. No appeal was actually entered. The parish which had obtained the order applied for costs, under stat. 8 & 9 Will. 3, c. 30, s. 3.

The sessions made an order confirming the order of removal, and further ordering payment of the costs incurred by the parish in preparing to sustain the order.

Held, that the order was not divisible; and, as the sessions had confirmed the order of removal, which they had not jurisdiction to do, no appeal having been actually entered, the order of sessions was not good even for so much as related to the costs. *Reg. v. Stoke Bliss.* 135

ISSUE ON TRIAL OF APPEAL.

Evidence under the Issue joined on the Examination and Grounds of Appeal.

21. An examination stated that the pauper had gained a settlement in the appellant parish by hiring and service, and also that he had been repeatedly relieved by their parish while non-resident.

A ground of appeal denied that the pauper had acquired such settlement either by hiring and service, or by any other means. *Held*, under this ground of appeal, that the appellants might shew that they had given the relief by mistake. *Reg. v. Bedingham.* 98

22. The examination of a pauper, after stating a birth settlement in the appellant parish, went on also to state that the pauper was by indenture bound apprentice in the respondent parish, and that during the apprenticeship he resided sometimes in the respondent and sometimes in the appellant parish.

The grounds of appeal alleged that the order was bad on its face, and that the pauper was settled in

the respondent "parish, by having been apprenticed as in the said examination stated," and by having served and resided, &c. in the respondent parish.

Held, that the statement in the examination, as to the apprenticeship, did not necessarily shew a merger of the birth settlement so as to preclude the respondents, on the trial of the appeal, from going into evidence of the birth settlement and relying on that only, for the removing justices might have disbelieved the evidence with respect to the settlement by apprenticeship.

That the appellants, who endeavoured to prove a settlement by apprenticeship in the respondent parish, in answer to the birth settlement, were bound to prove the indenture of apprenticeship, as a necessary part of their own case, and that this was not admitted by the respondents merely because stated in the examinations and not traversed in the grounds of appeal. *Reg. v. Latchford.* 290

JUDGMENT OF SESSIONS.

Sufficiency of Statement, in Examinations and Grounds of Appeal, as to particularity, to be decided by Sessions.

23. The sufficiency of grounds of appeal in point of particularity of statement is a question for the sessions, and, where they have come to a decision upon the point, this Court will not grant a mandamus to enter continuances and hear the appeal. *Reg. v. Kesteren.* 113

Form of Adjudication—Recitals in Judgment, shewing Jurisdiction of removing Justices.

24. An order of sessions recited an order of removal appealed against, in which the words "Westmoreland, to wit," were in the margin,

and which recited a complaint, "unto us whose names are hereunto set and seals affixed, being two of her majesty's justices, &c. for the said county."

Held, that the order of sessions shewed sufficiently that the justices who made the order appealed against were justices of the county.

The same order of removal purported to be directed "to the overseers of the poor of the township of Kirkby Lonsdale and to the overseers of the poor of the township of Casterton in the said county."

Held, that it sufficiently appeared that Kirkby Lonsdale (the respondent parish) was in the county of Westmoreland.

The order of sessions concluded:—"And whereas the overseers of the poor of Casterton did prosecute and carry on the said appeal to trial against the said order to the present general quarter sessions of the peace, wherein this Court, upon hearing of counsel on both sides, ordered that the said order be confirmed."

Held, a sufficient adjudication of confirmation of the order. *Reg. v. Casterton.* 266
Mandamus to justices to erase entry of judgment. See MANDAMUS.

SETTLEMENT.

Settlement lost by Appointment of separate Overseers for the several Townships of a Parish.

25. A pauper gained a settlement in a parish, consisting of several townships, by hiring and service. At that time the parish had only one set of overseers. Afterwards separate overseers were appointed for each township.

Held, that the pauper did not thereby become settled in the particular township where he had served. *Reg. v. Hunnington.* 351

Settlement by Renting.

26. Under stat. 6 *Geo.* 4, c. 57, a settlement may be gained by the joint renting of land. *Reg. v. St. Lawrence, Appleby.* 394
See also 9, 10, 11, 12, 13, 14.

CASE FROM SESSIONS.

How to be stated.

27. The Court will not entertain a case sent to them from the sessions where an alternative of the question proposed involves the necessity of sending the case back to be heard. *Reg. v. Kesteven.* 113

Form of Judgment of Q. B. on Case stated.

28. The form of the judgment of this Court, on a case sent from sessions, is simply to make absolute or discharge the rule for quashing the order of sessions; but, if the rule is discharged, the effect of the judgment is to confirm the order of sessions, and to fix the costs on the party bringing up the case, under stat. 5 *Geo.* 2, c. 19, s. 2. *Reg. v. Latchford.* 290

BASTARDY.

29. A party charged as putative father appeared at the petty session in pursuance of notice, and procured the application to be dismissed, on the ground that the notice was not signed by the majority of the parish officers.

He afterwards applied for a mandamus to the petty session to order payment of costs to him, on the ground that there had been a hearing of the application, within 4 & 5 *Will.* 4, c. 76, s. 73.

Held, that he was not entitled to costs as there had been no "hearing." *Reg. v. Hastings.* 132

30. On an application to the justices at petty sessions for a bastardy order under stat. 2 & 3 *Vict.* c. 85, the party charged attended with his

attorney, and after some witnesses had been examined in support of the application, and cross-examined by his attorney, requested that the charge should be determined at the quarter sessions under sect. 3.

Held, that, as the case had been entered upon, the justices properly refused to let it go to the quarter sessions.

A bastardy order, dated the 2d February, 1844, after reciting the birth of the child "on the 27th February now last past," and other necessary matters, ordered that the father should pay a sum of money to meet "the actual expense incurred in the maintenance of the child from the time of its birth as aforesaid to the time of making this order," and also a further sum weekly for future maintenance.

Held, that so much of the order as related to past maintenance was bad, as including more than six months' past maintenance, contrary to stat. 4 & 5 *Will.* 4, c. 76, s. 73, but that the order was good for the residue.

The order directed the payments to be made to the churchwardens and overseers of a township, the township having no churchwardens.

Held (dubitante Lord Denman C. J.) that the order was sufficient notwithstanding. *Reg. v. Osley.*

278

31. A party charged with being the putative father of a bastard child, under the 2 & 3 *Vict.* c. 85, attended before the petty sessions, where, after proof of the notice, the case was adjourned on his own application. On his appearance at the adjournment, the justices refusing to adjourn a second time, he offered to enter into recognisances, under the 3d section of the statute, to appear at the quarter sessions, but the justices refused to take his recognisance.

Held, that by remaining after such refusal, and proceeding with his defence, he had waived any objection to their jurisdiction. *Reg. v. Clarke.* 286

ORDER FOR MAINTENANCE OF
RELATIVES.

32. An order of petty sessions, under stat. 59 *Geo. 3*, c. 12, ordering a person to pay one entire sum weekly for the maintenance of his three grandchildren, so long as they should be chargeable to their parish, *held bad.* *Reg. v. Morten.* 500

LUNATIC PAUPER.

33. Under 9 *Geo. 4*, c. 40, ss. 38, 41, where a county lunatic asylum has been established for any county or district, justices acting for that county or district cannot remove a pauper lunatic to a hospital or private asylum, when the county asylum happens to have no room for the reception of the party. *Reg. v. Ellis.* 261
34. Where a lunatic pauper, whose settlement cannot then be ascertained, has been removed to an asylum under stat. 9 *Geo. 4*, c. 40, s. 41, and afterwards, on inquiry under sect. 42, an order of justices is made, ascertaining and adjudicating the place of his settlement and directing the expenses of his removal to be paid by the parish in which he is settled, the order must not direct such expenses to be repaid to the removing parish, as the treasurer of the county is the only person entitled to such repayment. *Reg. v. St. Andrew's, Worcester.* 382

POOR LAW COMMISSIONERS.

Stamp on sale by. See PLEADING, 2.

PORT.

Grant of port. See GRANT,

POSSESSION.

When insufficient to maintain trespass. See TRESPASS.

Traverse of plaintiff's possession will not let in evidence of title in defendant. See PLEADING, 4.

POUNDAGE.

See SHERIFF, 2.

POWER.

Bad execution of.

A marriage settlement, by which certain land was conveyed to the husband for life, remainder to the wife for life, remainder to the children of the marriage as tenants in common in tail, contained a power to the wife, in the event of her surviving her husband, to lease, by indenture under her hand and seal, for any term not exceeding 21 years in possession, so that the best annual rent should be reserved, and that none of the lessees should be dispunishable of waste by any express words to be therein contained, and so as in every of the said leases there should be contained a clause of re-entry for non-payment of rent, and that the lessees should seal and deliver a counterpart thereof.

The wife survived her husband, and married the defendant, and after the marriage demised to him by indenture under her hand and seal, at a rent assumed to be the best annual rent, the property comprised in the settlement, to hold for fourteen years from the 14th of October, 1834, if the lessee should so long live, and a counterpart was executed by the defendant.

Held, that this was not a valid execution of the power as against the tenants in tail in remainder, because a power coupled with an

interest requires a bargain between independent persons. *Doe d. Hart-ridge v. Gilbert.* 429

PRACTICE.

Amendment of plea. See AMENDMENT.

Attachment of feme covert. See ATTACHMENT.

Cancelling of bail bond given in Court of Bankruptcy. See BANKRUPTCY, 5.

Assignment of breaches. See BOND. Shewing cause in first instance against rule for quo warranto. See BROUGH, 3.

Suggestion of co-defendant's death after venire facias returnable. See CONSPIRACY, 1.

Costs. See COSTS.

New trial. See NEW TRIAL.

Payment of money into Court where several counts. See PLEADING, 5.

Warrant of attorney. See WARRANT OF ATTORNEY.

CAPIAS AD RESPONDENDUM.

No step in the Action.

1. The writ of capias ad respondendum under stat. 1 & 2 *Vict. c. 110*, is not a step in the action, but is altogether collateral to it. Where, therefore, a defendant is arrested under such a writ, the rule of *Trin. T. 3 Will. 4*, requiring the plaintiff "in such process" to declare before the end of next term after the arrest, is no longer applicable. *Ireland v. Berry.* 505

WRIT OF SUMMONS.

Misdescription of Defendant's Residence.

2. Where a person who resided in Maidstone, and was in the constant practice of resorting to Peel's Coffee House, London, was served at the coffee house with the copy of a writ of summons, describing him "of Sandling, near Maidstone,

in the county of Kent, but to be heard of at Peel's Coffee House, Fleet Street, in the city of London," the Court set aside the copy and service, on the ground that the defendant's residence was misdescribed. *Simpson v. Ramsay.* 396

JUDGE'S ORDER.

When conclusive.

3. Where an order has been made by a judge at chambers, and an application is afterwards made to the same judge to rescind his own order, which he entertains but dismisses, the Court will not interfere to review his decision. *Thompson v. Beck.* 49
4. A judge's order had been obtained by consent, for settling an action of assumpsit and staying proceedings, &c. on payment of 4s. 4d. into Court. The Master taxed the costs on the higher scale. A judge having ordered that the Master should review his taxation and tax on the lower scale, according to rule H. T. 4 *Will. 4*, the sum being under 20*l.*, the Court refused to rescind such order, on a suggestion that the cause was one which it would have been proper to try before a judge, the action being brought to try a right. *Keppel v. Shilson.* 87

SECOND APPLICATION.

Amended Affidavits.

5. Where a rule to pay the costs of a mandamus has been discharged on the ground that an affidavit on which it was moved is defectively intituled, the Court will hear a fresh application, but not where the defect of form is in the body of the affidavit.

Where, therefore, such an affidavit was wrongly intituled, "The Queen against the *Directors* of the Great Western Railway Company," instead of "The Queen against The Great Western Railway Com-

pany," and the affidavit at the beginning recited that a mandamus had been obtained "against the directors of the company," and the rule had been discharged, the Court refused to grant a fresh application, the same affidavit being used with these defects amended. *Reg. v. Great Western Railway Company.* 471

DISCONTINUANCE.

6. *Seemle*, the Court will not allow an action to be discontinued after a general verdict. *Young v. Hichens.* 599

PRESCRIPTION.

Prescriptions bad, as being indefinite or destructive of the subject-matter.

1. A plea in trespass, justifying under a claim, that defendant, as occupier of a brick kiln, and all the occupiers for the time being of the kiln for thirty years next before the commencement of the suit, had a right to dig and take away from the plaintiff's close, in every year and at all times of the year, so much clay as was at any time required by him and them for the purpose of making bricks. *Held* bad on motion non obstante veredicto, as the claim was an indefinite claim to all the clay of the close. *Clayton v. Corby.* 449
2. In an action on the case for working mines under ground near to the plaintiff's house, so that the house was injured and in danger of falling for want of proper support, the defendant claimed, as lessee of the manor in which the house was situate, and of the mines therein, a prescriptive right to work the mines under any houses, parcel of the manor, paying to the occupiers of the surface a reasonable compensation for the use of the surface, but without making com-

pensation on any other account, and justified under that right.

Held, 1. That such a prescription was bad as being unreasonable.

2. That such a right could not exist by custom.

3. That the right, if maintainable at all, might have been claimed under either a prescription or custom. *Hilton v. Earl Grawville.* 614

Right of Way.

3. A plea in trespass alleging that defendant and all other prior occupiers of a certain tenement, for twenty years next before the commencement of the suit, have had, used and actually enjoyed without interruption, and of right ought to have had, used, and actually enjoyed, &c., a way through the locus in quo, *held* bad after verdict, as the actual enjoyment was not alleged to have been had under the right claimed, and the enjoyment therefore was not shewn to be "as of right," according to stat. 2 & 3 Will. 4, c. 71, s. 5. *Holford v. Hankison.* 473

PRISONER'S COUNSEL BILL.

His right to copies of depositions. See CRIMINAL LAW, 6.

PRIVILEGE.

Action for arresting privileged persons. See ARREST.

PROHIBITION.

Church rate. See ECCLESIASTICAL LAW.

PROFIT A PRENDRE.

See PRESCRIPTION, 1.

PROMISSORY NOTES.

See **BILLS OF EXCHANGE.**

PROSECUTOR.

Meaning of. See **COSTS, 3.**

PROSECUTION.

Meaning of. See **EVIDENCE, 2.**

PUBLIC COMPANY.

See **BANKING COMPANY—RAILWAY COMPANY.**

**PUIS DARREIN CONTINU-
ANCE.**

Amendment of plea. See **AMEND-
MENT.**

QUO WARRANTO.

See **BOROUGH.**

RAILWAY COMPANY.

Assessment of, to poor rate. See **POOR, 2.**

Liability for Accident to Passenger.

1. By the London and Brighton Railway Company's Act (7 Will. 4 & 1 Vict. c. cxix.), the company were empowered to make and maintain a railway, which all persons were to have liberty to use with carriages properly constructed upon payment of tolls; and the company were empowered to provide locomotive engines and carriages for the conveyance of goods and passengers.

It was also enacted that no action should be brought against any person for anything done or omitted to be done in pursuance of the act without twenty days'

notice:—*Held*, that the company were not entitled to notice, where an action was brought against them for negligence in carrying a passenger, as they were sued merely as carriers, and not for any thing done or omitted under the act. *Carpue v. London and Brighton Railway Company.* 608

Meetings—Meaning of "Subscribers," "Owners" — Calls—Signature of Chairman to Minutes.

2. By sect. 125 of the Birmingham, Bristol and Thames Junction Railway Act, 6 Will. 4, c. lxxix., the company are directed to cause the names of persons entitled to shares to be entered in a book, and a certificate to be delivered to every such proprietor on demand. By sect. 129, parties, who have subscribed, or shall hereafter subscribe, towards the said undertaking, are required to pay the sums of money, or such proportions, &c. as shall be called for by the directors. By sect. 130, the directors have power to make calls of money "from the subscribers to and proprietors of the said undertaking;" "and if any owner or proprietor of any such share shall neglect or refuse to pay such his rateable proportion," the company may sue him; and the directors are authorised to declare the shares belonging to such owner forfeited:—*Held*, that in sect. 130 the words subscribers, owners and proprietors are used indiscriminately, so that a party who had originally subscribed, but had never been registered or received his certificate, was liable, in an action of debt charging him as a subscriber, "on calls made from the several subscribers to and proprietors of the said undertaking," the calls appearing in evidence to have been made upon the proprietors.

By sect. 118, proceedings of meetings are to be entered into a book, "and shall be signed by the chairman of such respective meetings:"—*Held*, that a minute of a proceeding, entered at a subsequent meeting, with the words "read and confirmed," to which was attached the signature of the chairman of the prior meeting, was sufficiently signed within the meaning of the section. *West London Railway Company v. Bernard.* 397

RATE.

Church rate. See CHURCH RATE.
Highway rate. See HIGHWAY, 4.
Poor rate. See POOR.

REASONABLE AND PROBABLE CAUSE.

When Absence of, to be averred.

In case for unlawfully instigating the bringing an action, it is not enough to aver that the defendant "unlawfully did advise, promise, instigate and stir up" the then plaintiff to commence and prosecute the action, without also averring that it was commenced and prosecuted without reasonable or probable cause. *Flight v. Leman.* 67

When a defence in an action for deceit. See CASE.

"REASONABLE TIME."

Uncertainty in pleading. See FREIGHT.

RECEIPT.

See STAMP.

REFERENCE.

See PARTNERSHIP.

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REGULA GENERALIS.

As to satisfaction piece. 783

REMAND.

Right of prisoner remanded to copies of depositions. See CRIMINAL LAW, 6.

REPLEVIN.

Action against replevin clerk for taking insufficient sureties. See PLEADING, 8.

RIGHT OF WAY.

See PRESUMPTION, 3.

ROAD.

See HIGHWAY.

SATISFACTION PIECE.

Regula generalis as to. 783

SCIRE FACIAS.

After fi fa.

It is no ground for setting aside a writ of sci. fa. as irregular, that there has been no return to an alias fi. fa. issued on the same judgment, although something has been done under that writ, because this may be the subject of a plea to the sci. fa.

It is no sufficient answer to the sci. fa., that a writ of fi. fa. issued under the same judgment within a year after the judgment, unless it appear that the debt was satisfied by the levy which took place under such writ.

A plea to a sci. fa. stating as above, and that the sheriff entered under the writ, and seized goods and chattels in the defendant's house, is therefore bad, for not averring that the goods and chattels were the defendant's, and that they

3 H

produced satisfaction: also (per *Patteson J.*,) for averring that the writ was returned and filed, without adding that there is a record of such writ and return.

Where such a plea is pleaded, although with a conclusion in abatement, the proper judgment is *quod habeat executionem*. *Holmes v. Newlands*. 642

SEDUCTION.

Service put in issue by not guilty.
See PLEADING, 3.

SERVICE.

Of writ. See PRACTICE, 2.

SESSION.

See HIGHWAY—POOR.

SEWERS.

Presentment by Commissioners of.

On a presentment to the commissioners of sewers, the party charged appeared on the proper day in the court of sewers, and tendered his traverse in writing. The clerk to the commissioners (according to the alleged practice of the court) filed a demurrer to this traverse on the ground of informality. The party charged applied for leave to amend his traverse, which the court refused, and gave judgment against him on the demurrer. On this a rate was made:—*Semble*, that the commissioners were wrong in admitting the demurrer to the traverse on the ground of informality: or, at all events, that they should have given the party leave to amend.

But, the judgment on demurrer having taken place in September, 1841, the order to pay the rate in June, 1842, and a distress levied

thereon, in July, 1842, this Court discharged a rule, applied for in Trinity Term, 1843, for a certiorari to remove the presentment, judgment, rate and order, on the ground that the application was out of time. *Reg. v. Commissioners of Sewers of the Tower Hamlets*. 232

SEXTON.

Tenure of office. See OFFICE.

SHERIFF.

Action against, for not levying.

1. A count in case against a sheriff, alleging that the plaintiff had recovered a judgment against *H. B.*; that there were goods and chattels of *H. B.* in the sheriff's bailiwick of which he might have levied, but that he had not the monies ready, &c., but falsely returned that he had seized the goods of *H. B.*, which remained with him unsold for want of buyers:—*Held* good on general demurrer, as a complaint that the sheriff might have levied and neglected so to do.

Plea to this count, that the defendant, as sheriff, took certain specified goods of *H. B.*, and also certain other goods of *H. B.*, and held them until the plaintiff directed him to withdraw from the possession of all the goods so named, except the specified goods; that he then withdrew from the possession of all the goods so levied except the specified goods; and that the specified goods did remain unsold in his possession for want of buyers:—*Held* bad on demurrer, as not answering the whole complaint, for want of showing that *H. B.* had not still other goods within the bailiwick of which the monies might have been levied. *Pitcher v. King*. 584

Poundage on Execution of Elegit.

2. On the execution of a writ of elegit the sheriff's poundage under statutes 3 Geo. 1, c. 15, s. 16, and 8 Geo. 1, c. 25, s. 5, is to be calculated on the yearly value of the lands extended, and not on the sum to be levied under the writ.
Nash v. Allen. 16

Duty of, where directed to return non est inventus.

3. Where a writ of ca. sa. is delivered to the sheriff, with direction to be returned non est inventus; it is nevertheless the duty of the sheriff to detain the defendant if he surrender himself, or if he be surrendered by his bail before the return of the writ; and the sheriff is entitled to his poundage as on an ordinary arrest. *Magnay v. Monger.* 24

Action against, for arrest of privileged person. See ARREST.
See also SCIRE FACIAS.

SHIPPING.

See FREIGHT.

SIGNATURE.

To minutes by chairman of meeting.
See RAILWAY COMPANY, 2.

SLANDER.

See DEFAMATION—ECCLESIASTICAL LAW.

STAMP.

Return of banking company's accounts to commissioners of stamps.
See BANKING COMPANY.
Award stamp. See PARTNERSHIP.
Agreement stamp, on sale by poor law commissioners. See PLEADING, 2.

Receipt.

The following instrument was ten-

dered by defendant in support of a plea of payment of rent: "Mr. Jones (defendant) having written off the sum of 75*l.* from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent till the 24th of July, 1841." The instrument was signed by M.; the mortgage debt in question was due from M. to defendant; and the paper had been delivered by M. to defendant as a settlement of account. It was stamped with a 1*l.* stamp, with no denomination, and appearing to have been affixed more than one month after the signing and delivery of the paper: *Held*, inadmissible, as being a receipt within 55 Geo. 3, c. 184, s. 10, and consequently not stamped in time.
Lucas v. Jones. 774

SUGGESTION.

Of co-defendant's death. See CONSPIRACY, 1.
Nunc pro tunc to remove objection to venue. See CRIMINAL LAW, 4.
Of Breaches. See BOND.

SUMMONS, WRIT OF.

See PRACTICE, 2.

TIMBER.

Rateability. See HIGHWAYS, 4.

TOWN COUNCIL.

See BOROUGH—GAOL.

TRESPASS.

Liability of attorney. See CONTEMPT.
Trespass or case. See ARREST.
When plea of "not possessed" improper. See PLEADING, 4.
Costs, where damages under 40*s.*
See COSTS, 2.

*Possession when insufficient to maintain
Trespass.*

Plaintiff and defendant were owners of boats employed in a fishery. Plaintiff's boat cast a fishing sear round a shoal of mackerel, with the exception of a comparatively small opening which the sear did not quite fill up, but through which, in the opinion of witnesses, the fish could not escape. Defendant's boat then came in through the opening, and took the mackerel. *Held*, that the plaintiff could not maintain trespass for taking his fish, his possession not having been complete. *Young v. Hichens*. 592

USURY.

See **PAWNBROKER.**

Where a bond is conditioned for the repayment of a sum with interest, at 5*l.* per cent., to be computed from a day earlier than that of the advance of the money as recited in the condition of the bond (the issue being in an action on the bond, whether the bond were given on a corrupt agreement for payment of more than 5*l.* per cent.), the bond and condition put in by the defendant are *prima facie* evidence that the contract was usurious, and it lies on the plaintiff to offer explanation.

Where the loan secured by a bond is also collaterally secured by the deposit of title deeds of leasehold lands, *Held*, that such a contract is not protected by 2 & 3 *Vict.* c. 37, s. 1, being within the proviso at the end of that section as a loan on the security of lands, tenements, &c.

Seemle, that stat. 2 & 3 *Vict.* c. 37, s. 1, is retrospective. *Hodgkinson v. Wyatt*. 443

VENUE.

Right to discontinue after verdict.
See **PRACTICE**, 6.

VERDICT.

See **CRIMINAL LAW**.

VIDELICET.

See **DEBT—PLEADING**, 2.

WAGER.

See **GAMING**.

WAIVER.

Of right to take case to another tribunal. See **POOR**, 30, 31.

WARRANT OF ATTORNEY.

1. A warrant of attorney attested as follows: "signed, sealed, and delivered by the above-named *A. B.* in the presence of me, the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained to the said *A. B.* before the execution thereof by him," and subscribed merely with the name of the attorney, *Held*, not sufficient with reference to stat. 1 & 2 *Vict.* c. 110, s. 9. *Everard v. Poppleton*. 322
2. *Seemle*, that on the trial of a feigned issue, between a creditor who has obtained execution on a judgment on a warrant of attorney, and the assignees in bankruptcy of the debtor, to ascertain the validity of the execution, it lies on the creditor to shew that the warrant was given in an action commenced adversely, if he relies on 1 *Will.* 4, c. 7, s. 7. *Linnit v. Chaffers*. 14

WARRANT OF COMMITMENT.

See **COMMITMENT—CONTEMPT**.

WATCH COMMITTEE.

See **BOROUGH**.

WAY.

Right of. See **PRESCRIPTION**, 3.

WOOD.

Rateability to highway rate. See **HIGHWAYS**, 4.

WRITS.

Capias ad respondendum. See **PRACTICE**, 1.

Summons. See **PRACTICE**, 2.

Capias ad satisfaciendum. See **CAPIAS AD SATISFACIENDUM—SHERIFF**, 3.

Elegit. See **SHERIFF**, 2.

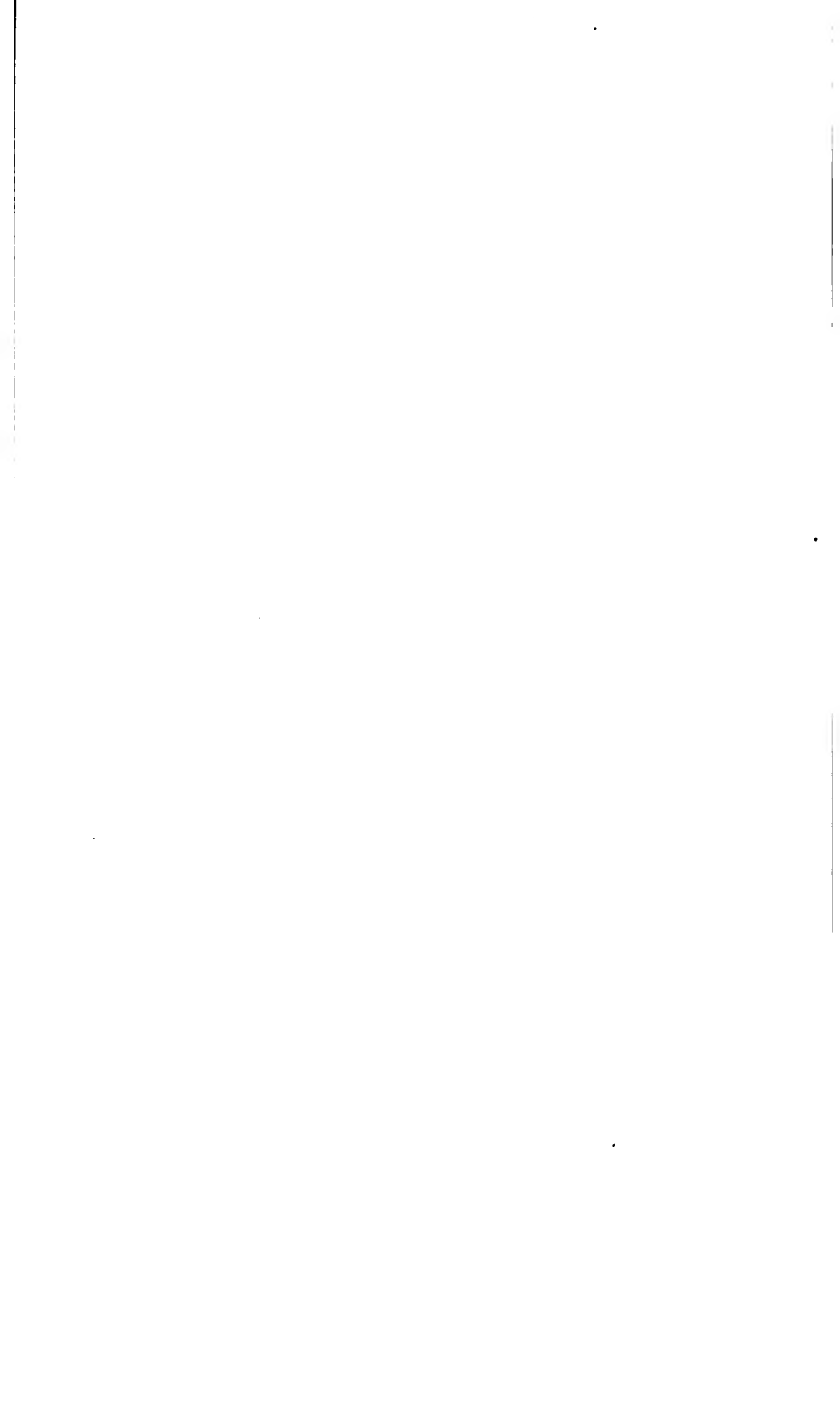
Inquiry. See **BOND—PLEADING**, 1.

Scire Facias. See **SCIRE FACIAS**.

Fieri Facias. See **EXECUTION—SHERIFF**, 1.

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